92-895

No. _____

Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1992

DAVID J. ROUCH,
Petitioner,
v.
ENQUIRER AND NEWS
OF BATTLE CREEK, MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER IN A DEFAMATION ACTION BROUGHT BY A PRIVATE CITIZEN, THE FIRST AND FOURTEENTH AMENDMENTS REQUIRE AN APPELLATE COURT TO AFFORD NO DEFERENCE TO JURY FINDINGS OF FACT AND TO CONDUCT AN INDEPENDENT *DE NOVO* REVIEW OF THE ENTIRE RECORD TO DETERMINE WHETHER FALSE STATEMENTS WERE "MATERIALLY FALSE"?

II.

WHETHER PROOF THAT A PUBLICATION FALSELY ACCUSED A PRIVATE CITIZEN OF A CRIME HE DID NOT COMMIT, FALSELY STATED HIS CHILDREN WERE WITNESSES AGAINST HIM, AND FALSELY CLAIMED HE HAD BEEN CHARGED WITH A SEX CRIME IS INSUFFICIENT EVIDENCE, AS A MATTER OF LAW, TO OVERCOME THE PROTECTIONS OF THE FIRST AMENDMENT IN A DEFAMATION ACTION?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, David J. Rouch, a private citizen, who was plaintiff in the court below and the respondent, Enquirer and News of Battle Creek, Michigan, a Delaware Corporation and publisher of the newspaper, the *Enquirer and News of Battle Creek*, who was defendant in the court below. There have been no other parties to this action.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, David J. Rouch, respectfully requests that a Writ of Certiorari issue to review the opinion of the Supreme Court of Michigan entered in this proceeding on July 15, 1992.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Michigan which is sought to be reviewed is published at 440 Mich. 238, and is reprinted in the Appendix, p. A-1. The opinion of the Michigan Court of Appeals is published at 184 Mich. App. 19, 457 N.W.2d 74, and is reprinted in the Appendix at p. A-165. The order of the trial court denying the defendant's motion for judgment n.o.v. and motion for new trial is unreported and is reprinted in the Appendix at p. A-163; the trial judge's statements of reasons for denying judgment n.o.v. and a new trial are unreported and are reprinted in the Appendix at p. A-151. A pre-trial decision of the Michigan Supreme Court in this case reversing summary judg-

ment for defendant was published at 427 Mich. 157, 398 N.W. 2d 245, and is reprinted in the Appendix at p. A-83. The pre-trial decision of the Michigan Court of Appeals reversing the granting of summary judgment to defendant is published at 137 Mich. App. 39, 357 N.W. 2d 794, and is reprinted in the Appendix at p. A-63. The order of the trial court granting summary judgment to defendant is unreported and is reproduced in the Appendix at p. A-59; the trial judge's statement of reasons for granting summary judgment are unreported and are reproduced in the Appendix at pp. A-57 and A-60.

JURISDICTION

The judgment of the Supreme Court of Michigan, the highest court of Michigan, was entered on July 15, 1992; a timely motion for rehearing was filed on August 5, 1992, and was denied by order dated August 24, 1992. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech, or of the press ...

United States Constitution, Amendment XIV, § 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ...

INTRODUCTION — SUMMARY OF ARGUMENT

This case presents squarely to this Court two unresolved and important questions that have caused conflict and confusion in the federal and state courts in defamation actions. When a private citizen obtains a verdict against a publisher: (1) does the First Amendment require an appellate court to conduct a *de novo* review of the entire record for sufficiency of evidence of falsity and (2) when is evidence of false statements insufficient, as a matter of law, to support a jury's verdict and to overcome a publisher's First Amendment protections?

The lower courts, including the Michigan Supreme Court in the opinion sought to be reviewed, have correctly noted that neither of these questions has been answered by this Court. In the breach, the Michigan Supreme Court has leaped in and fashioned its own rule based on the First Amendment. The Michigan Supreme Court has held that an appellate court must conduct a complete *de novo* review of the entire record in all defamation cases, including cases brought by private-figures, to determine whether evidence of false statements is sufficient to constitute "material falsity." This Constitutionally compelled rule of review, the Michigan Supreme Court held, requires no deference to any special verdict of a jury or a jury's factual finding of material falsity.

This decision of the Michigan Supreme Court is contrary to the decisions of other appellate courts who have reviewed defamation verdicts, have applied the First Amendment, and have afforded some deference to jury findings. See pp. 17-19 of this Petition. The decision of the Michigan Supreme Court is also contrary to the direct dictates of this Court in *Bose* v. *Consumers Union*, 466 U.S. 485, 514, n. 1, (1984) which rejected *de novo* review of the entire record, and *Harte-Hanks* v. *Connaughton*, 491 U.S. 657 (1989) which required a review of a jury's special findings with some deference to the jury. And the decision of the Michigan Supreme Court is even contrary to a previous decision of its own, wherein the court held that an independent review of evidence of falsity in a defama-

tion case should occur with an eye to whether the jury's verdict was against the great weight of the evidence. *Locricchio* v. *Evening News Assn.*, 438 Mich. 84, 112, 122, 476 N.W.2d 112 (1991), *cert. den.*, 112 S. Ct. 1267 (1991).

The decision of the Michigan Supreme Court also expands a federal rule of appellate review of public-figure defamation cases to private-figure cases, contrary to the policy suggested in *Gertz* v. *Welch*, 418 U.S. 323 (1974)

Since this Court's decision in *Philadelphia Newspapers* v. *Hepps*, 457 U.S. 767 (1986), which imposed upon a private-figure libel plaintiff the burden of proving falsity, this Court has not enunciated a standard by which an appellate court should review evidence of falsity in a private-figure defamation case for its sufficiency to strip First Amendment protections from a media defendant. Petitioner can discern no consistency among the lower courts in articulating a standard, and even the Michigan Supreme Court has abandoned its previous standard for review of evidence of falsity in a private-figure defamation case announced in *Locricchio* v. *Evening News Assn.*

In the absence of an articulated standard of appellate review of evidence of falsity or a standard for sufficiency of evidence of falsity, the danger exists that an appellate court will simply substitute its judgment for that of a jury on a question of fact, as the Michigan Supreme Court did in this case, and even though the plaintiff proved in the lower court that the publisher printed an article which falsely accused him of a crime he did not commit, falsely stated police information, falsely claimed that charges against him had been authorized, and falsely claimed he had been identified as a rapist by his own children, the appellate court may reject jury findings and find that these statements were not "materially false" as a matter of First Amendment law.

De novo review of the entire record for sufficiency of all the evidence of falsity in private-figure cases without a standard of review will result in trial on appeal in defamation cases and will lead to the creation of barriers to defamation

verdicts which are so high as to discourage the private figure from attempting to pursue a media defendant for defamation of his good name.

Petitioner is without remedy except in this Court.

STATEMENT OF THE CASE

I.

STATEMENT OF FACTS

In the early morning hours of Friday, December 21, 1979, David J. Rouch was roused from his bed in his home in Emmett Township, Michigan, by officers of the Emmett Township Police Department. Tr. 128-129.[1] The Emmett Township officers were picking up Rouch at the request of the Bedford Township Police Department, who suspected Rouch of a rape of his ex-wife's babysitter which had occurred that morning. Later that afternoon, Mr. Rouch would be released from the county jail without a court appearance and without being formally charged with rape. Tr. 134, 906. No charges were filed against Rouch; eventually, another man would be formally charged with criminal sexual conduct in the rape of the babysitter. p. A-199, Tr. 138.

Stan Kaufman, a reporter employed by the *Enquirer and News of Battle Creek*, began making "phone rounds" of the police departments at 8:00 a.m. on December 21, 1979. p. A-203. Kaufman was told by unidentified officers at Emmett Township and Bedford Township that Rouch had been arrested for rape. pp. A-203-204. Later that afternoon, Kaufman received information from the Prosecutor's

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[1] **References to the trial transcript of the trial in the Calhoun County, Michigan, Circuit Court, in February of 1988 will be indicated by "Tr." and the page number of the transcript. The transcript has been filed and is part of the lower court records; if a portion of the transcript has been reproduced in Petitioner's Appendix, the reference will be to the page number of the Appendix.**

Office in Calhoun County, Michigan, regarding Rouch's arrest, and he claimed he spoke to either Chief John Bell or Officer David Minier of the Bedford Township Police Department to confirm that he could publish information regarding Rouch's arrest. p. A-205. Both Chief Bell and Officer Minier denied talking to or releasing any information to Kaufman or anyone else at the *Enquirer*. pp. A-206-208, A-209-211. Both Officers cited a departmental policy not to release information about persons arrested but not formally charged. pp. A-207, A-210.

After his telephone calls, Kaufman prepared an article on the rape and Rouch's arrest that was left for editors to review to determine whether it should be published. The editors of the *Enquirer* chose to place an article in the Saturday morning edition on December 22, 1979, under the headline "Police Arrest Suspect in Babysitter Assault." See article reproduced in its entirety at p. A-198 of the Appendix. The article named Rouch, listed his address, and stated he had been arrested "and charged" with the sexual assault of a 17-year-old woman who was babysitting with "his children" at his ex-wife's house in Bedford Township. The article went on to state that Mr. Rouch was free "pending his arraignment" in court the following week. The article stated that Rouch was "charged with first degree criminal sexual conduct." The article went on to claim that Rouch "entered the house about 4:00 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said." The article then went on to state that Mr. Rouch had been "identified by his children ... ."[2] The article concluded with the statement that "[t]he charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office."

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[2] **Rouch initially had been identified mistakenly by the two young children of Rouch's ex-wife and the babysitter as the ski-masked rapist on the basis of voice.**

The Respondent has conceded that Mr. Rouch had not been identified by his children as a rapist and that formal charges in the form of a warrant were never authorized by the prosecutor's office. Tr. 1031, 1036. No evidence was produced to suggest that Rouch was the rapist who entered his ex-wife's house and attacked her babysitter in front of her children. The *Enquirer* eventually ran a correction under "Setting it Straight" which is reproduced in its entirety in the Appendix at p. A-199. The correction noted that Mr. Rouch was "never formally charged in the case" and that police "later arrested another man who is being prosecuted for the crime." The second article confirmed that Mr. Rouch had not been charged by the prosecutor's office, because the prosecutor's office had insufficient proof and because the state police "had another suspect."

II.

PROCEDURAL HISTORY AND HISTORY OF FEDERAL QUESTION

A. Pretrial

David J. Rouch commenced a libel action against the defendant on December 5, 1980, in the Circuit Court for Calhoun County, Michigan, by filing a Complaint and demand for trial by jury. p. A-212. In his Complaint, the plaintiff alleged that the statements published by the defendant were "false and defamatory" and were made with disregard of his rights of "privacy and individual rights . . . ." The plaintiff asked for damages, both general and punitive, in the sum of $1,000,000.

On June 7, 1982, the trial judge granted the defendant's motion for summary judgment, holding that the plaintiff, though a private citizen, had to show "actual malice" on the part of the defendant since the report published was a matter of public concern. pp. A-57, A-60. The Michigan Court of Appeals reversed the trial court on September 4, 1984,

holding that the plaintiff need not prove malice in publishing the false statements, but only negligence. The defendant appealed to the Michigan Supreme Court. In its brief filed in the Michigan Supreme Court after the Court of Appeals decision of 1984, the defendant argued that the plaintiff's libel claim "is Constitutionally barred," claiming rights under the federal constitution. p. A-214. The Michigan Supreme Court affirmed the Court of Appeals, reversing the trial court's granting of summary judgment to the plaintiff, and remanded the cause for trial on December 26, 1986. The Michigan Supreme Court interpreted *Gertz* v. *Welch* and federal constitutional requirements in holding that Michigan was free to set a standard of negligence for liability of publishers in defamation actions brought by private citizens, and that Michigan must require, as a matter of federal law, that the plaintiff bear the burden of proving falsity. The Supreme Court was silent as to whether falsity needed to be proved by clear and convincing evidence or merely a preponderance of the evidence.

B. Trial and Verdict

After remand, trial commenced in Calhoun County, Michigan, Circuit Court, in February of 1988.

Testimony at trial revealed that Rouch was now 52 years old, had worked for General Foods for 23 years and had lived at the same address for 13 years. Tr. 122-123. His sons, who were 16 and 14 at the time of their father's arrest, testified that they were confronted by classmates at school after the article was published and were submitted to laughing and taunting from their classmates. Tr. 343-354, 368-374. The children were asked by classmates if they witnessed their father raping the babysitter, as the article had claimed. Tr. 354, 374.

Other witnesses testified that upon reading the article of December 22nd they had concluded that Rouch had committed the offense. One witness, Diane Laird, testified that "the fact that they publicly accused this man, I just was sure

they couldn't go that far without it being so . . . ." Tr. 416. Charles Anderson testified that he figured Rouch "must have done it." Tr. 497. Witnesses testified that they refused to allow their children to associate with the plaintiff's children, that they wondered why "that bastard" was still loose in the community after committing this crime, and that they asked the Petitioner why he was not in jail. Tr. 407, 408, 498. Co-workers testified that women were uncomfortable working with Rouch after the article appeared and that his suspected guilt of this uncharged offense was a topic of conversation at the plant and caused cruel tricks to be played on Rouch. Tr. 362, 380, 494.

The plaintiff also presented expert testimony of a journalism professor, the late Clark Mollenhoff, who had been the recipient of the Pulitzer Prize for investigative journalism regarding his reporting on the Teamsters Union and Jimmy Hoffa. Tr. 196. Professor Mollenhoff testified that the employees of the *Enquirer* demonstrated negligence in the manner in which they reported Rouch's arrest and that the reporter, Kaufman, was a "puppet of the police" because "whatever the police told him went into the paper without any regard for whether he had rights to print that or not." Tr. 201. The defense presented Stan Kaufman and their own experts who rebutted the testimony of Mollenhoff.

Mollenhoff was critical of the press because in recent years he had seen some segments of the press "roll over the bodies and the reputations of people freely." Tr. 206.

At the conclusion of the evidence, counsel for the plaintiff argued to the jury that the article in question was false because it stated that Mr. Rouch had committed a crime that he did not commit, because it falsely claimed that charges were authorized by the prosecutor's office when they were not, because it falsely claimed that police had authorized release of the information to the newspaper when the police denied that and because it falsely claimed that Rouch had

been identified by his own children. Tr. 991-998. Counsel for the defendant argued to the jury that the article was not false, because it was an accurate depiction of what had occurred surrounding Rouch's arrest and an accurate depiction of the police records regarding Rouch's arrest. Tr. 1025, 1030-31 Counsel for defendant admitted the prosecutor's office issued no warrant charging Rouch with an offense, but claimed that the police "charged" Rouch. Tr. 1031. Defense counsel conceded Rouch was not identified by his children, but that the "inaccuracy" was not "material." Tr. 1036. He stated that the article was not "an accusation of rape" but a statement of an arrest. Tr. 1037-1038.

After argument of counsel, the jury was instructed, in guiding them as to whether statements in the article were false, to:

> interpret the words according to their ordinary and obvious meaning. You must give the words the fair and reasonable interpretation that an average reader would give them. You need not look at words used in the article according to any technical or legal definition. Whether the statements in the article were false is for you to decide after considering the statements in the article, in the light of all the evidence in the case. p. A-200.

The judge also instructed the jury that the plaintiff must prove that the false statements in the article were "materially false" and tended to harm the plaintiff's reputation. The Court explained that this element was the same as whether the article was "libelous." p. A-201. The trial judge instructed the jury that they:

> should consider the meaning of the article in deciding if it libeled the Plaintiff. The meaning of the article is that meaning which under the circum-

stances a reasonable person who read the article reasonably understands to be the meaning intended. *Id.*

The jury was given a special verdict form which it returned with a finding that the allegations in the article were "materially false." p. A-197. On February 19, 1988, the jury returned a verdict for the plaintiff in the sum of $1,000,000.00. A judgment was entered in favor of the plaintiff against the defendants in that amount with statutory costs and interest on February 29, 1988. p. A-150.

C. Post-Trial Proceedings

On April 18, 1988, the trial judge denied the defendant's motion for judgment n.o.v. and for new trial, with an order entered April 28, 1988. The trial judge stated that it was clear, as a matter of law, that the jury could find that there was material falsity in the article. In its appeal to the Michigan Court of Appeals after the verdict, the defendant argued that the plaintiff failed to overcome the "Constitutional defense of truth." p. A-215. The Michigan Court of Appeals, in an opinion on June 4, 1990, affirmed the trial court's denial of motion for judgment n.o.v. and for new trial and affirmed the jury's verdict. The appeals court rejected any federal constitutional bars to the jury's verdict. The majority held that the plaintiff met his burden of proving falsity by proving that the defendant had falsely reported that plaintiff had been charged with criminal sexual conduct and that his own children had identified him as a rapist. Judge Allen dissented, arguing that the Plaintiff had not carried his burden of proof that the statements in the *Enquirer* article were materially false.

The Defendant then sought leave to appeal to the Michigan Supreme Court, and when leave was granted, argued that the Plaintiff "failed to prove that the article was materially false and failed to overcome the First Amendment." p. A-217. The Supreme Court reversed the Court of Appeals and the jury on July 15, 1992, basing its decision on the First Amendment of the United States Constitution. p. A-10. The Court held the

First Amendment compelled independent judicial review of defamation verdicts, and held that evidence of falsity in defamation cases must be sufficient to prove "material falsity." The majority of the court accepted the defendant's theory of the meaning of the article and of the meaning of the word "charged," finding that the article was not an accusation of a crime but a story of an arrest, and finding that the use of the word "charge" was not materially false since the police "charged" the plaintiff by virtue of his arrest. Since the prosecution concurred in the arrest of Rouch, it had authorized the arrest, the court said. The misidentification of plaintiff's children was not a sufficient inaccuracy to overcome First Amendment "breathing room" for falsity.

Chief Justice Cavanagh and Justice Levin dissented, arguing that in libel cases an appellate court should not review credibility determinations, disregard previous fact findings or create new fact findings. Rather, those justices believed that the court should exercise its independent judgment whether, as a matter of law, the evidence in the record supports the verdict. Since the jury returned a special verdict finding material falsity as it affected the average reader, and since independent review discloses sufficient evidence to support the jury's verdict, Justices Cavanagh and Levin would have affirmed the verdict.

Justice Cavanagh and Justice Levin both agreed that the evidence was sufficient to sustain the jury's special verdict of "materially falsity," but those Justices agreed as to the meaning to be afforded to the term "charged."

The majority opinion did not discuss what deference, if any, an appellate court must provide to a jury's verdict, what standard of proof the plaintiff must comply with in presenting evidence of falsity, or when evidence of falsity is insufficient, as a matter of law, to sustain a verdict for the plaintiff. On August 24, 1992, the Supreme Court denied rehearing of its opinion of July 15, 1992.

REASONS FOR GRANTING THE WRIT

I.

A STATE APPELLATE COURT IN A PRIVATE-FIGURE DEFAMATION CASE IS NOT COMPELLED BY THE FIRST AMENDMENT TO REVIEW THE ENTIRE RECORD *DE NOVO* AND SUBSTITUTE ITS JUDGMENT FOR THAT OF THE JURY, WHERE THE JURY'S SPECIAL VERDICT OF MATERIAL FALSITY IS SUPPORTED BY COMPETENT EVIDENCE.

The right of citizens to speak freely on matters of public concern and to criticize official conduct must be jealously guarded and protected. The First Amendment of the Constitution "delimits a state's power to award damages for libel in actions brought by private officials against critics of their official conduct." *New York Times* v. *Sullivan*, 376 U.S. 254, 283 (1964). We must also protect the right of our citizens to live life free from damaging falsehoods and to seek redress for injuries which occur when those falsehoods are negligently published. "The individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.'" *Gertz* v. *Welch*, p. 341, quoting *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966).

This Court, in its decisions delineating the applicability of protections of the First Amendment to the requirements of proof in state defamation cases, has distinguished between cases where the plaintiff was a public figure and cases where the plaintiff was a private citizen. Because the First Amendment protects "uninhibited, robust and wide-open" debate about matters of public concern and criticism of official conduct, a public figure who is a plaintiff in a defamation action must not only meet the common law burden of proving falsity of published facts, he or she must also prove "actual

malice" as part of the burden of proof. The protections of the First Amendment require:

> [A] federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. (*New York Times* v. *Sullivan*, pp. 279-280)

This federal rule is not applicable to defamation actions brought by private citizens. Private citizens, unlike public figures, are not required to prove "actual malice" but must only show fault amounting to at least negligence, for publishing a false and defamatory statement about a private citizen. "The state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to private citizens who bring defamation actions." *Gertz*, p. 343. Private citizens are at a greater disadvantage than public figures because:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. p. 344.

States, "so long as they do not impose liability without fault ... may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[3] p. 347.

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[3] **The Michigan Supreme Court has held that in Michigan negligence is the applicable standard of fault for determining liability of a publisher. Malice on the part of the defendant need not be shown in a private-figure defamation case in Michigan. *Rouch* v. *Enquirer and News*, 427 Mich. 157, 398 N.W.2d 245 (1986), p. A-83. (The pre-trial decision in this case)**

In order to further protect and preserve the protections that the First Amendment provides to criticisms of public conduct, a second federal rule is required in public-figure defamation cases: the requirement of independent judicial review for evidence of malice and a standard by which evidence of malice needs to be proved — clear and convincing evidence:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositers of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice." *Bose* v. *Consumers Union*, p. 511.

Although the majority opinion in *Bose* used broad language about the federal rule for independent judicial review of cases in which First Amendment protections are involved, *de novo* review of the "entire" record was not required. *Bose*, p. 514, n. 1. The holding of the case was simply:

> that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times* v. *Sullivan*. Appellate judges in such a case must exercise independent judgment in determining whether the record establishes actual malice with convincing clarity." p. 514.

Philadelphia Newspapers v. *Hepps* defined the burden of proof for a private-figure libel plaintiff. The First Amendment requires that a private-figure plaintiff must bear the burden of proving falsity in a defamation action. Although the Court's

opinion in *Bose* had stated "there is a significant difference between proof of actual malice and mere proof of falsity . . .," *Bose*, p. 511 (footnote omitted), the court in *Hepps* was silent as to how the burden of proof of falsity must be carried, whether by a preponderance of the evidence, by clear and convincing evidence, or by some other standard. *Hepps* was also silent as to the standard of review to be applied to reviewing evidence of falsity.

In *Harte-Hanks Communications, Inc.* v. *Connaughton*, this Court reviewed a jury verdict in favor of a public-official plaintiff in a defamation action and, in remarks contained in a plurality of opinions, found the appellate court's review of juror determinations of falsity Constitutionally adequate; however, no standard was clearly articulated for review of findings of facts by jurors in defamation actions. The Sixth Circuit Court of Appeals had reviewed a jury's special verdict that an article was false by the clearly-erroneous standard. p. 662. The petitioner had suggested to this Court that one error of the Sixth Circuit was the failure of the court to review *de novo* the entire record and instead to rely on the subsidiary findings of the jury. p. 664. The question before this Court was viewed as one of whether the record in a defamation case was sufficient to support a finding of actual malice. p. 685. This question, the court said, is a question of Constitutional law. The court accepted, however, the doctrine that credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses, and found that the court must examine for itself the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect. p. 688. The court, as it had in *Bose*, disdained *de novo* review of the entire record and concluded that a proper standard for review of a jury's verdict is what testimony the jury must have accepted or rejected, not on what grounds it *may* have based its verdict. A concurring

opinion by Justice White, with whom the Chief Justice joined, argued that historical facts, such as who did what to whom and when, are reviewable only under the clearly-erroneous standard. Justice Scalia suggested that a reviewing court must always review the evidence to determine what a jury "could reasonably" have found. pp. 697-698. Justice Scalia concurred on the grounds that the court's opinion was correct in providing "deference to jury findings." Justice Scalia would have adopted the Sixth Circuit's analysis, which is that independent assessment of whether malice was clearly and convincingly proved should be made on the assumption that the jury made all the supportive findings that it reasonably *could have made*.

All of these cases left unanswered the question of the standard of review of a jury's finding of falsity in a private-figure defamation case.

In the absence of an answer to that question, federal and state appellate courts have, with the exception of Michigan, reviewed findings of falsity in private-figure cases or public-figure cases with some deference to jury findings where the facts are contested at trial as to the truth or falsity of the allegations, and federal and state courts have limited independent judicial review to the existence of malice in public figure cases.

See, *Levine* v. *CMP Publications, Inc.*, 738 F.2d 660 (5th Cir., 1984), (the issue of truth or falsity in a private-figure libel case which had been brought under Texas law was a question of fact for the jury or fact-finder and should not be subject to the appellate review mandated by *Bose* for constitutional facts, such as actual malice; *Newton* v. *National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir., 1990), *cert. den.*, 112 S. Ct. 192 (1991), (the Court assumed the plaintiff had proved falsity of the allegations, and reviewed the judgment independently only as to questions of actual malice);

Bartimo v. *Horseman's Benevolent and Protective Assn.*, 774 F.2d 894 (5th Cir., 1985), *cert. den.*, 475 U.S. 1119 (1986), (the independent judicial review in a libel case is limited to the constitutionally mandated element of malice); *Nor-West Communications* v. *City of St. Paul*, 924 F.2d 741 (8th Cir., 1991) (*Bose* standard of independent judicial review not applicable to a court's finding of absence of standing which finding may be reviewed under the "clearly erroneous" standard); *Starkins* v. *Bateman*, 150 Ariz. 537, 724 P.2d 1206 (1986) (independent appellate review of a jury verdict is limited to the existence of malice in a public-figure libel case involving a non-media defendant); *Brown* v. *K & D. Corp.*, 205 Conn. 8, 529 A.2d 1292 (1987) (a jury verdict in favor of a defendant in a libel action does not require independent judicial review, because such review is only required when a defamation action has been brought by a public official). Some of these courts have noted the absence of guidance as to whether the *Bose* standard of independent judicial review for actual malice applies to the review of questions of falsity. See *Levine*, footnote 19, pp. 672-673, and *Newton*, footnote 7, p. 669.

Nowhere has the confusion of the appellate courts as to the proper standard of review of juror findings of falsity been more adequately demonstrated than in the multiple opinions in the District of Columbia Circuit in *Tavolareas* v. *Piro*, 759 F.2d 90 (D.C. Cir., 1985), and *Tavolareas* v. *Piro*, *en banc*, 817 F.2d 762 (D.C. Cir., 1987), *cert. den.*, 484 U.S. 870 (1987). In the first opinion, a panel opinion, the majority would have held that *Bose* does not require that any factual determination other than the "ultimate conclusion" needs to be independently reviewed, with a dissenting judge urging the court to hold that *Bose* requires a *de novo* review of the entire record in defamation cases. 759 F.2d 108. In the *en banc* opinion, the majority of the court reviewed the evidence for actual malice, found actual malice did not exist, but refused to go as far as the panel in interpreting *Bose*, with a concurring opinion by the Chief Justice chastising the court for

avoiding the opportunity to articulate a standard of review for questions of falsity, and a dissenting opinion again urging that the *Bose* standard should be adopted for the review of all factual determinations in libel actions.

The Michigan Supreme Court, in the decision from which this Petition for Certiorari is being sought, has gone farther than *Bose* or *Harte-Hanks* require and farther than other federal and state appellate courts known to the Petitioner in establishing a Constitutionally-based standard for *de novo* appellate review of the entire record to review evidence of all factual findings of falsity in private-figure libel verdicts. The Michigan Supreme Court interpreted *Bose* as requiring independent judicial review *de novo* of the entire record for material falsity in private-figure libel verdicts, despite the fact that *Bose* explicitly states there is no such requirement of *de novo* review of all the evidence, as pointed out by dissenting Justice Cavanagh, who urged the court not to adopt this new, expansive federal standard for review of evidence in defamation cases, but to afford some deference to a jury verdict. This constitutionally compelled standard of *de novo* review of all the evidence permitted the Michigan Supreme Court to give its own meaning to disputed factual statements and to determine whether they, instead of the jury, as an average reader, read the statements in the disputed article to be materially false. The members of the court all conceded that the statements were false, but used the doctrine of *de novo* review to find that the falsity was not material.

The Michigan Supreme Court, in cases other than defamation cases, adheres to the clear error standard for review of findings of the trial court sitting without a jury. See, e.g., *Poirier* v. *Grand Blanc Township* (*Aft. Rem.*), 192 Mich. App. 539, 548, ___ N.W.2d ___ (1992). And Michigan adheres to the standard that a jury's verdict should not be set aside if there is competent evidence to support it because the trial court cannot substitute its judgment for that of the fact finder. See,

e.g., *King* v. *Taylor Chrysler-Plymouth, Inc.*, 184 Mich. App. 204, 210, 457 N.W.2d 42 (1990). The Michigan Supreme Court, prior to the decision in the instant case, had even adhered to a different standard of review of a jury's verdict in a defamation case, holding that a jury's verdict should be reviewed for evidence of falsity as to whether the jury's verdict is against the great weight of the evidence. *Locricchio* v. *Evening News Assn.*, *supra*.

By setting a *de novo* standard of review of all evidence in defamation cases brought by private figures that affords no deference to a jury's findings, the Michigan Supreme Court has effectively nullified jury findings, and all factual questions in defamation cases in Michigan will be tried *de novo* in appellate courts. Such nullification of jury findings was not contemplated by the framers of our Constitution in the name of free speech. The private plaintiff, who in today's world is at a great disadvantage in facing powerful media defendants, has an insurmountable burden when his or her reputation is damaged by the publication of patently false allegations. See, Bollinger, *Images of a Free Press*, U. of Chicago Press (1991).

Unless this Court grants this Petition for Certiorari and clarifies that the standard of review in defamation cases brought by private figures requires some deference to jury findings of fact, preservation of the common law right of action for defamation in the State of Michigan will be lost, preservation of the scope of a jury's province as fact finder will be abandoned in defamation cases in Michigan, and Michigan will be applying a federal rule it has created that no federal or state appellate courts seem to apply. This rule is not compelled by the First Amendment, and should not be applied to set aside a jury's verdict which is supported by competent evidence.

II.

THE EVIDENCE OF FALSE STATEMENTS PRINTED BY THE PUBLISHER, WHICH INCLUDED FALSE ACCUSATIONS OF A CRIME THAT PLAINTIFF DID NOT COMMIT. FALSE ACCOUNTS OF POLICE INFORMATION, AND A FALSE STATEMENT THAT THE PLAINTIFF HAD BEEN CHARGED WITH A CRIME, WAS SUFFICIENT, AS A MATTER OF LAW, TO CARRY THE BURDEN OF PROOF OF MATERIAL FALSITY SO AS TO OVERCOME THE FIRST AMENDMENT PROTECTIONS OF A PUBLISHER IN A DEFAMATION ACTION.

Falsity within the context of a defamation action is not absolute, for the First Amendment protects some degree of falsity. *Philadelphia Newspapers* v. *Hepps*. This Court has accepted the common law definition of falsity within the context of a public figure libel action: a statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson* v. *New Yorker*, 501 U.S. ___, 111 S. Ct. 2419 (1991) *Masson* held that false quotations published by the defendant had the degree of falsity required to present a jury question of actual malice so as to withstand a motion for summary judgment. This Court did not consider the standard for appellate review of juror findings of falsity in private figure cases.

In *Philadelphia Newspapers* v. *Hepps*, this Court held that the Plaintiff had *the burden* of proof, but did not extend the *Bose* requirement that falsity, like malice, needs to be proved by "clear and convincing evidence." In *Harte-Hanks*, this Court did not clarify the standard of sufficiency for a jury's special verdict of falsity in public-figure cases where malice is required and was silent as to the standard of sufficiency of evidence of falsity in private-figure cases.

The Michigan Supreme Court, in the case sought to be reviewed, did not articulate any standard by which the suffi-

ciency of the evidence of falsity is reviewed for "material falsity" — clear and convincing evidence, a preponderance of the evidence, evidence from which a jury could reasonably conclude, etc. The court simply suggested that the First Amendment permitted it to substitute its judgment for that of the jury without articulating any standard of review of the sufficiency of the evidence required by the First Amendment. The court abandoned a "great weight of the evidence" test for Constitutional review of a jury verdict in a defamation case that it had accepted only last year in *Locricchio* v. *Evening News Assn.*, *supra*

The question of the standard by which falsity needs to be proved to strip away the protection of the First Amendment is a thorny question which is unanwered by this Court. In the absence of a clear articulation of a Constitutionally-based standard of sufficiency, the federal and state appellate courts have been attempting to articulate their own standard. See cases at pp. 17-19 of this Petition. The Michigan Supreme Court is the only court petitioner is aware of that permits an appellate court to substitute its judgment for that of the jury without articulating any standard for review of the sufficiency of the evidence or without providing any deference to the jury's finding of "material falsity."

It is difficult to envision a case where the plaintiff's proof of falsity of the allegations would not be more sufficient to overcome First Amendment protections than the Plaintiff's proof in this case. The Defendant conceded that the article published about the Plaintiff was false when it claimed that rape charges against the Plaintiff had been authorized by the prosecutor's office and when it stated that the Defendant had been identified as a rapist by his own children. Tr. 1031, 1036.

It is also difficult to argue that the jury's finding of material falsity in this case should be afforded no deference in determining Constitutional sufficiency of the evidence of

material falsity. The question of "material falsity" was joined at trial before the jury as a question as to whether the article could be viewed as a fair story of an arrest or whether the article was an accusation that Mr. Rouch had, indeed, committed the crime he was charged with and the acts mentioned in the article. It was not disputed that Mr. Rouch did not commit the offense of which the article accused him. The Plaintiff presented numerous witnesses who testified that the meaning of the article to them was that the Plaintiff had committed the offense charged, done terrible things, and would be going to jail. The jury, in reviewing the article and its meaning, was properly instructed to view it as an average reader in the context of the entire article. pp. A-200-202. The jury's special verdict finding the article "materially false" has abundant evidence underpinning the verdict, is not an irrational determination, and is not against the great weight of the evidence.

There were also credibility questions brought before the jury in the instant case. The reporter, Stan Kaufman, claimed, unequivocally, that he received authorization to publish the information from the Bedford Township Police Department, either Officer Minier or Chief Bell. Both Chief Bell and Officer Minier categorically denied ever talking to the reporter or providing any information about the plaintiff to any member of the press. Both testified that it is the policy of the Bedford Township Police Department not to release any information concerning a person who has been arrested before formal charges are filed.

The petitioner suggests that where evidence establishes clear falsity of allegations in a publication, where there are credibility questions involving the witnesses, and where there are factual interpretations to be decided as to the meaning of statements to the average reader, a jury's decision that false statements and inaccuracies are "materially false" for the purpose of a defamation action brought by a private

citizen is a special verdict that should not be set aside on appeal when there is evidence from which a jury could reasonably conclude that published statements were materially false and when the finding is not clearly erroneous. The First Amendment establishes no rule of "sufficiency of evidence of falsity" that required the verdict to be set aside in this case.

CONCLUSION

In a dissenting opinion in *Bose*, Chief Justice Rehnquist joined by Justice O'Connor noted that the purpose of independent review was not to allow an appellate court to place its thumb on the scales in favor of the party claiming a constitutional right, but to allow perceived shortcomings of the trier of fact, by way of bias or some other factor, to be compensated for. p. 518. The dissent expressed its concern as to whether independent judicial review might bring about "less confidence in the judgments of lower courts and more entirely fact bound appeals." p. 520. The Michigan Supreme Court has caused this warning to come true.

This Court has stated that it is "through the course of case-by-case adjudication" that it can "give content to . . . otherwise elusive constitutional standards." *Harte-Hanks*, p. 686. Such elucidation "is particularly important in the area of free speech . . ." *Id.*

This case presents an instance where, through the course of case-by-case adjudication, this Court can give meaning to the Constitutional standard to be applied for appellate review of private-figure libel verdicts against media defendants and give meaning to the Constitutional standard by which the sufficiency of the evidence of material falsity is to be judged by the appellate courts in reviewing the findings of the trier of

fact. Both standards are ripe to be decided and are well presented by this case.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Michigan.

Respectfully submitted,

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Dated: November 23, 1992

92-895

No. _____

Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1992

DAVID J. ROUCH,
Petitioner,
v.
ENQUIRER AND NEWS
OF BATTLE CREEK, MICHIGAN,
Respondent.

APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR CERTIORARI

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DECISION SOUGHT TO BE REVIEWED:
OPINION [*AFTER REMAND*]

(State of Michigan — Supreme Court)

(Filed July 15, 1992)

(DAVID J. ROUCH, Plaintiff-Appellee, v ENQUIRER & NEWS OF BATTLE CREEK, Michigan, A Delaware Corporation, Defendant-Appellant — No. 89799)

Michael F. Cavanagh, Chief Justice;
Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

BEFORE THE ENTIRE BENCH

BOYLE, J.

> A responsible press has always been regarded as the handmaiden of effective judicial administration . . . . Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. *Sheppard* v *Maxwell*, 384 US 333, 350; 86 S Ct 1507; 16 L Ed 2d 600 (1966).

In this case we are called upon to examine the balance between protecting an individual's reputation from false and defamatory statements and fostering energetic, tumultuous public debate to ensure continued scrutiny of police, prosecutors, and the courts through

cherished constitutional rights guaranteeing freedom of speech and the press.[1] Newspapers have a longstanding tradition of reporting on criminal justice and police conduct. "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp* v *Cohn*, 420 US 469, 492; 95 S Ct 1029; 43 L Ed 2d 328 (1975). Protecting that tradition without trampling the rights of individual citizens is the task facing this Court.

The plaintiff, David Rouch, was arrested, booked on a charge of first-degree criminal sexual conduct by the police upon authorization from an attorney in the prosecutor's office, and released after an informal bond hearing by a magistrate acting in her formal capacity pursuant to MCR 6.104. The defendant newspaper, the Enquirer & News of Battle Creek, published an account of Rouch's arrest, the charge against him, and his release on bond. Later, when Rouch appeared for his formal arraignment, he was told that the charges had been dropped. Rouch predicates his suit upon inaccuracies in the newspaper report.

Perhaps it is not surprising that with such important rights at stake, this controversy has required so much appellate court time.[2] When this Court first considered

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[1] **Both of these values are explicitly embodied in Const 1963, art 1, § 5:**

> **Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.**

[2] **This case began more than a decade ago and has been considered twice by the Michigan Court of Appeals and once by this Court. See 137 Mich App 39; 357 NW2d 794 (1984); 184 Mich App 19; 457 NW2d 74 (1990); 427 Mich 157; 398 NW2d 245 (1986).**

the case, it reviewed an abbreviated record prepared prior to a summary disposition motion to determine "the applicability of Michigan's statutory 'public and official proceedings' statute, MCL 600.2911(3); MSA 27A.2911(3), and the viability of its common-law qualified public-interest privilege." 427 Mich 157, 160; 398 NW2d 245 (1986). With further factual development, the matter returns to this Court for additional review. We now consider whether the defendant published a materially false article. We need not reach the issue whether it was negligently published,[3] and whether the more com-

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[3] Because of our resolution of the material falsity issue, we need not resolve the question of negligence. Nevertheless, we observe that plaintiff's theory regarding fault apparently was that the newspaper reporter had been poorly trained and consequently failed to further investigate information provided to him by the police. The existence and scope of any constitutionally based doctrine of neutral reportage remains as yet undefined. See *Smith* v *Daily Mail Publishing Co*, 443 US 97, 102; 99 S Ct 2667; 61 L Ed 2d 399 (1979) ("state action to punish the publication of truthful information seldom can satisfy constitutional standards"); *The Florida Star* v *BJF*, 491 US 524; 109 S Ct 2603; 105 L Ed 2d 443 (1989); *Butterworth* v *Smith*, 494 US 624; 110 S Ct 1376; 108 L Ed 2d 572 (1990); *Landmark Communications, Inc* v *Virginia*, 435 US 829; 98 S Ct 1535; 56 L Ed 2d 1 (1978); *Oklahoma Publishing Co* v *District Court*, 430 US 308; 97 S Ct 1045; 51 L Ed 2d 355 (1977); *Greenbelt Cooperative Publishing Ass'n* v *Bresler*, 398 US 6; 90 S Ct 1537; 26 L Ed 2d 6 (1970); and *Cox Broadcasting Corp* v *Cohn*, *supra*. Other state and federal courts have questioned the extent to which newspapers should be required to verify information obtained from governmental sources such as police reports absent evidence that the publisher had good reason to suspect falsity. *Torres-Silva* v *El Mundo, Inc*, 3 Media L Rep 1508, 1512 (PR, 1977); *Wilson* v *Capital City Press*, 315 So 2d 393 (La App, 1975); *Appleby* v *Daily Hampshire Gazette*, 395 Mass 32; 478 NE2d 721 (1985); *LaMon* v *Butler*, 44 Wash App 654; 722 P2d 1373 (1986); *Walters* v *Sanford Herald, Inc*, 31 NC App 233; 228 SE2d 766 (1976); *Ricci* v *Venture Magazine, Inc*, 574 F Supp 1563 (D Mass, 1983). In this case, there was no suggestion that the information was inherently implausible. Nor was there any proof or allegation that cast doubt on the accuracy of the police report regarding Rouch's arrest.

plete factual record brings the case within Michigan's statutory privilege.[4]

We hold that the article was not materially false,[5] and we therefore reverse the decision of the Court of Appeals and remand for entry of judgment notwithstanding the verdict in favor of the defendant.

I

A. The Procedural History

On December 5, 1980, David Rouch commenced this libel action against the Enquirer & News of Battle Creek by filing a complaint in the Calhoun Circuit Court. Rouch claimed that the newspaper had falsely published an article describing his arrest as a suspect for the rape of a seventeen-year-old girl who was babysitting for his former wife. After initial discovery, the

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[4] In *Rouch I*, I was unwilling to hold that the statutory privilege had been subsumed. The factual predicate for assertion of the statutory privilege is contained in the record. Although I would conclude that the privilege is applicable to an informal arraignment for bond purposes before a magistrate, see MCL 600.8511 *et seq.*; MSA 27A.8511 *et seq.*; MCL 765.1; MSA 28.888, MCL 600.8512a; MSA 27A.8512(1), and MCR 6.104(G), a majority of the Court being unpersuaded that we should reach this issue, the opinion does not address it.

[5] Contrary to the observation in the separate dissent, the arrest (which Justice Levin concedes it is not defamatory to describe as a charge) was authorized by the prosecutor. The record establishes that the Bedford Township police called the assistant prosecutor before they took plaintiff into custody and that the prosecutor, after being "briefed on the complaint and the circumstances surrounding the arrest of suspect advised to lodge" plaintiff on a charge of first-degree criminal sexual conduct. Indeed, the plaintiff acknowledges that the prosecutor authorized the incarceration. If what Justice Levin means is that the article should have reported that the prosecutor authorized the incarceration of the plaintiff on the charge of Criminal Sexual Conduct I, as plaintiff contends, we respond to that argument in section IV. If what he means is that there was governmental involvement in the lodging of the charge of CSC I, that is true, and plaintiff does not contend otherwise.

newspaper filed a motion for summary disposition, seeking an order of no cause of action because the newspaper was entitled to qualified privilege under the terms of MCL 600.2911(3); MSA 27A.2911(3). In support of its motion, the newspaper relied on the depositions of the plaintiff, affidavits of the news reporter who authored the article, and a police sergeant who provided a copy of the incident report with respect to Rouch's arrest. Relying on *Schultz* v *Newsweek, Inc*, 668 F2d 911 (CA 6, 1982), the trial court ruled that the newspaper was entitled to a qualified privilege for matters of general public interest. As a result, the trial court concluded that the plaintiff was required to prove actual malice in order to sustain his claim. The trial court granted summary judgment in favor of the defendant on the basis that the plaintiff was unable to establish a genuine issue of material fact regarding the defendant newspaper's malice.

The Court of Appeals reversed the ruling of the trial court, stating that the statutory privilege was unavailable on the basis that no warrant was issued in the case, that the common-law privilege to report matters in the public interest was unavailable because the details of the alleged crime fell outside the scope of matters promoting the public interest, and that the trial court erred in requiring a showing of malice.[6] We granted the defendant leave to appeal.[7]

In *Rouch* v *Enquirer & News of Battle Creek*, 427 Mich 157; 398 NW2d 245 (1986), (hereafter *Rouch I*), we considered the scope of Michigan's statutory privilege, the continued existence of Michigan's qualified privilege in light of the constitutional dimensions of the law of defamation

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6 137 Mich App 39.

7 422 Mich 937 (1985).

as developed by the United States Supreme Court in *New York Times* v *Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), and its progeny, and the burden of proving falsity. Writing for the majority, Justice Brickley considered the questions of privilege and discussed the applicability of the "official proceedings privilege" statute, MCL 600.2911(3); MSA 27A.2911(3). Justice Brickley concluded that an arrest, absent judicial action, falls outside the scope of "public and official proceedings" as covered in Michigan's statute.[8] In rejecting an interpretation of Michigan's statutory privilege that would reach arrests or police reports absent judicial action, Justice Brickley reasoned that the language "evoke[d] notions of adjudicatory action, rather than of government action generally." 427 Mich 172. Justice Brickley further explored the effect of constitutional mandates on the availability of Michigan's public-interest privilege. Concluding that the public-interest privilege had been largely subsumed by the more expansive constitutional protections afforded by the *New York Times* standard, we adopted the *Gertz*[9] negligence standard in place of the former public-interest privilege, 427 Mich 202, and remanded the case to the trial court for further proceedings, with the instruction that the plaintiff bore the burden of proving falsity.

On February 9, 1988, an eight-day trial commenced in circuit court. Witnesses included the news reporter responsible for the story, police officers, the plaintiff, the magistrate responsible for holding the informal

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8 Since our decision in *Rouch I*, the Legislature has amended Michigan's statutory privilege to broaden its scope to cover matters of public record, governmental notices, announcements, and written or recorded reports or records generally available to the public. MCL 600.2911(3); MSA 27A.2911(3), as amended by 1988 PA 396, § 1. See also Nichols, *HB 4932 and the Rouch case: A Brief sketch of Michigan libel law*, 2 Det C L R 689.

9 *Gertz* v *Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

bond hearing, and several expert witnesses. Significantly, John Bell, a Battle Creek police officer, testified that the prosecutor, Mr. Pattison, authorized Mr. Rouch to be arrested on the charge of first-degree criminal sexual conduct. The defendant introduced a copy of the police report that detailed the booking of Rouch for criminal sexual conduct on the basis of the authorization of Prosecutor Pattison. Officer Bell also explained that the arraignment for bond purposes was held before the magistrate.[10] Adding to the factual record in *Rouch I*, which focused on the facts regarding the arrest and police reports, the trial record included the testimony from the magistrate who was responsible for setting bond. The magistrate testified that one of her official duties was to set bond for persons being held in custody. Although the magistrate did not specifically recall the details of this hearing, the defendant introduced a bail bond form signed by the defendant which evidenced a $10,000 personal recognizance bond with appearance for arraignment required on December 28, 1979. The form detailed the offense as criminal sexual conduct in the first degree. The magistrate agreed that the form indicated that she had set bond and described the manner in which such bonds were set. She explained that to set bond, she would consider the length of the defendant's residence in the community, his employment status, his reputation and character, his prior criminal record, his record of appearance or non-

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10 Bell explained that Magistrate Strong sometimes conducted the proceeding to set a personal recognizance bond over the telephone, and other times she did it in her office. Bell called the proceeding an "arraignment for bond purposes." Magistrate Strong agreed that she sometimes conducted the hearing by telephone. When this was done, the sheriff's department would prepare the form, and the defendant would sign it and be released.

appearance on other occasions, the nature of the offense, and the probability of conviction.[11]

The defendant renewed its motion for directed verdict incorporating all its prior arguments, and again raised the contention that the case fell within Michigan's statutory privilege, relying particularly on the magistrate's testimony as evidence of an official proceeding. The jury returned a verdict in favor of the plaintiff and awarded damages of one million dollars. The defendant unsuccessfully moved for judgment notwithstanding the verdict. A stay was granted, and the newspaper appealed in the Court of Appeals.

The Court of Appeals addressed numerous issues in affirming the jury verdict. The Court rejected the defendant's contention that the plaintiff failed to prove that the article was materially false. The Court disagreed with the defendant's assertion that the plaintiff failed to submit sufficient evidence to establish negligence. In addition, the Court disagreed with the defendant's suggestion that publication of the article was within the protection of the official proceedings statute.

We granted the defendant leave to appeal. 437 Mich 1035 (1991).

B. The Factual Background

This case began on December 21, 1979, with the arrest of David Rouch as a suspect in the rape of his former wife's babysitter. Rouch was arrested without a warrant, held by the police, booked on the charge of first-degree criminal sexual conduct, as authorized by

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[11] **Michigan law authorizes magistrates to carry out a wide range of judicial functions, including setting bond for defendants. See MCL 600.8511 *et seq.*; MSA 27A.8511 *et seq.* See also MCL 765.1; MSA 28.888 (which authorizes a magistrate to set bail and to let an accused out of jail on recognizance).**

the prosecutor, and released on $10,000 personal recognizance bond after an informal hearing before a magistrate.[12] It is undisputed that Rouch was never formally arraigned on a warrant and that the police eventually pursued another suspect. The facts surrounding Rouch's arrest were set forth in an article published by the Battle Creek News & Enquirer.[13] Mr. Rouch conceded that the article in question and its references to his arrest, booking, and release on bond were accurate. Plaintiff complained, however, about three supposedly material errors. First, plaintiff contended that the article falsely asserted that Rouch was "charged" with sexual assault. Second, the plaintiff complained that the article falsely stated that he was identified by his children when, in reality, he was identified by his former wife's children, his former stepchildren. Third, plaintiff complained that the article was inaccurate in that it asserted that the charge against Rouch was authorized by the Calhoun County Prosecutor's office.

The facts regarding the manner in which the newspaper reporter received the information are in dispute. The reporter claimed that he contacted members of the Bedford Police Department in Calhoun County who relayed the information to him, and that he held the information until he was informed that court action had occurred and Rouch was released on bond with an arraignment set for the following week. Because the

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12 **Bedford Township officers, the township where the crime occurred, requested Emmett Township officers to arrest Rouch at his home in Emmett Township. He was placed in the custody of the Bedford Township police. Upon authorization from the Calhoun County Prosecutor's office, Rouch was removed to the county jail in Marshall and booked on a charge of CSC I. The magistrate for the 10th District Court in Calhoun County released Rouch on a personal recognizance bond until his formal arraignment could be held.**

13 **The full text of the article is set forth *infra* at 22-23 [*original Opinion pagination; cf. pp A-20–A-22, infra*].**

reporter could not identify with certainty to whom he spoke at the police department, and the officers who testified could not recall speaking with the reporter about this specific case, the plaintiff suggests that the reporter uncovered the information in some other way.[14]

II

A proper determination of the plaintiff's defamation claims requires consideration of the elements of libel under Michigan law in light of the constitutional requirements and principles that shape libel law to be consistent with First Amendment strictures. Michigan adheres to the commonly accepted meaning of a defamatory communication set forth in the Restatement of Torts. *Nuyen* v *Slater*, 372 Mich 654, 662; 127 NW2d 369 (1964). 3 Restatement Torts, 2d, § 559, p 156, provides:

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

In *Locricchio* v *Evening News Ass'n*, 438 Mich 84, 116; 476 NW2d 112 (1991), we enumerated four components for a cause of action for libel: 1) a false and defamatory statement concerning the plaintiff, 2) an unprivileged communication to a third party, 3) fault amounting to at least negligence on the part of the publisher, and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.

In addition to satisfying Michigan's common-law requirements for a libel cause of action, a litigant must

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[14] **We need not resolve this factual dispute in view of our resolution of the other issues.**

comply with constitutional requirements. As we recognized in *Locricchio*, analysis under the constitution has focused on three elements: "the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant,[15] and the public or private character of the speech." *Id.* at 118. In this case involving a private plaintiff, a media defendant, and a publication regarding an area of public concern, the constitution requires that the plaintiff bear the burden of proving falsity. *Philadelphia Newspapers, Inc* v *Hepps*, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986). Further, after *Gertz* v *Welch, Inc*, 418 US 323, 347; 94 S Ct 2997; 41 L Ed 2d 789 (1974), invited states to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual," this Court adopted negligence as the standard in Michigan. *Rouch I*, 427 Mich 195.[16] Thus, the plaintiff must establish that the defendant's publication of the communication at issue was negligent.[17]

The Court of Appeals affirmed the jury verdict in this case, ruling that the plaintiff met his burden of proving falsity, that sufficient evidence was submitted to establish the defendant's negligence, and that the defendant could not invoke the protection of Michigan's "official proceedings" statute, MCL 600.2911(3); MSA 27A.2911(3).

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15 We noted in *Locricchio* that it is unclear whether the media status of the defendant necessitates a higher level of protection. 427 Mich 90, n 7. The United States Supreme Court has not yet resolved the issue.

16 We reserved for another occasion the question whether the standard of proof with regard to falsity or negligence is "clear and convincing evidence" or some lesser standard. *Locricchio*, 438 Mich 123.

17 We note that both common-law and constitutional questions regarding the availability of and necessary proofs for damages were raised in this case. Because of our resolution of the other issues, we leave these issues for another day.

Rouch v Enquirer & News (On Remand), 184 Mich App 19; 457 NW2d 74 (1990). We disagree with the ruling on material falsity.[18]

III

In *Locricchio*, 438 Mich 110-114, we held that in reviewing a libel case affecting constitutionally protected public discourse, an appellate court must independently review the record with regard to falsity. The concept of independent appellate review of the record reflects a longstanding concern that judges "exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp* v *Consumers Union of the United States, Inc*, 466 US 485, 511; 104 S Ct 1949; 80 L Ed 2d 502 (1984). Since *New York Times Co* v *Sullivan*, *supra* at 285, the United States Supreme Court has emphasized the importance of careful appellate review of the evidence to ensure that constitutional principles are properly applied. There, the Court explained:

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated. . . .' In cases where that line must be drawn, the rule is that we 'explain for ourself [*sic*] the statements in issue and the circum-

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[18] **The Court of Appeals also considered numerous trial court rulings on negligence, the official proceedings statutes, evidentiary matters, and instructional issues. Because we conclude that plaintiff's claim cannot survive review of the initial issue, we need not reach these issues.**

> stances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' . . . We must 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Reiterating this conclusion in *Time, Inc* v *Pape*, 401 US 279; 91 S Ct 633; 28 L Ed 2d 45 (1971), the Court underscored its concern that an independent examination of the evidence be conducted. Writing for the majority, Justice Stewart stated:

> Inquiries of this kind are familiar under the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but it will re-examine the evidentiary basis on which those conclusions are founded.' *Id.* at 284.

Justice Stewart recalled that the occasion for such review "frequently" arose "in the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other . . . ." *Id.*

More recently, the United States Supreme Court revisited the question of the proper standard of appellate review in *Bose Corp* v *Consumers Union of the United States, Inc*, *supra*. *Bose* rejected the imposition of the clearly erroneous standard of FR Civ P 52(a) in reviewing a determination of actual malice in cases governed by *New York Times Co* v *Sullivan*, *supra*. Recounting the lengthy tradition of independent review in the context of constitutional facts, the *Bose* Court characterized the

requirement as "a rule of federal constitutional law" that "emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage . . . reflect[ing] a deeply held conviction that judges — and particularly Members of this Court — must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose* at 510-511.

Likewise, the United States Supreme Court independently reviewed the record in *Harte-Hanks Communications, Inc* v *Connaughton*, 491 US 657; 109 S Ct 2678; 105 L Ed 2d 562 (1989), to conclude that the judgment was supported by clear and convincing proof of actual malice. The Court reiterated its conclusion in *Bose* that the sufficiency of evidence to support a finding of actual malice is a question of law. It emphasized the "unique character of the interest protected by the actual malice standard," *Harte-Hanks* at 686. The Court predicated the rule requiring independent review on the difficulty in giving "content to these otherwise elusive constitutional standards," coupled with the importance of "such elucidation . . . in the area of free speech . . . ." *Id.*

Although the scope of this doctrine had not been clearly delineated by the United States Supreme Court, in *Locricchio*, we concluded that "an independent appellate review of the burden of proof with regard to falsity in private-figure, public-interest cases deters 'forbidden intrusion on the field of free expression' as a logical corollary to independent review of actual malice." *Id.* at 113 (quoting *Sullivan* at 285). We reasoned that *Hepps* abrogated the common-law presumption of falsity in libel cases, creating "an issue of constitutional fact regarding whether a plaintiff carries the burden of

proving falsity." 438 Mich 113.[19] We considered that the absence of meaningful appellate review might result in upholding a jury verdict lacking adequate evidentiary support. We analogized this result to a "failure to review for clear and convincing evidence of actual malice," *id.*, and concluded that the promised protection for media defendants afforded by placing the burden of proof on the plaintiffs would "ring hollow" in the absence of meaningful review of the trial court's finding regarding falsity. *Id.* at 114.[20]

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19 Constitutional facts have been defined as "facts fundamental to the existence of a constitutional right — for example, whether a confession was coerced or a film was obscene." Louis, *Allocating adjudicative decision making authority between the trial and appellate levels: A unified view of the scope of review, the judge/jury question, and procedural discretion*, 64 NC L R 993, 995, n 13 (1986). The doctrine of independent review of constitutional facts has arisen in First Amendment and other constitutional contexts. See, e.g., *Jacobellis* v *Ohio*, 378 US 184, 190; 84 S Ct 1676; 12 L Ed 2d 793 (1964) (the court has an "obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments," and in doing so "cannot avoid making an independent constitutional judgment on the facts of the case"); *Payne* v *Arkansas*, 356 US 560, 562; 78 S Ct 844; 2 L Ed 2d 975 (1958) ("where the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record"); *Norris* v *Alabama*, 294 US 587; 55 S Ct 579; 79 L Ed 1074 (1935) (appellate courts have the duty to analyze the facts to safeguard constitutional rights where the facts and conclusions of law are intermingled); *Ng Fung Ho* v *White*, 259 US 276; 42 S Ct 492; 66 L Ed 938 (1922) (sanctioning constitutional fact review of a challenge to an administrative deportation warrant).

20 We realize that the *Harte-Hanks* Court construed the requirement for an independent review more narrowly than *Bose*. This different emphasis formed the basis for disagreement between Chief Justice Cavanagh and the majority in *Locricchio*. Chief Justice Cavanagh contended that falsity involves "a classic issue of pure historical fact," while actual malice, like the voluntariness of a confession, involves a mixed fact/law question. Chief Justice Cavanagh there urged this Court to reject mandatory independent review of such pure historical facts in favor of applying a sufficiency-of-the evidence standard that construes the evidence in the light most favorable to the verdict. *Locricchio* at 136 (Cavanagh, C. J., concurring in the result).

The Court has acknowledged that the "appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller* v *Fenton*, 474 US 104, 113; 106 S Ct 445; 88 L Ed 2d 405 (1985). In discussing this problem, the Court, at 114, stated:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.

The *Miller* Court, at 114, cited with approval Monaghan's article discussing *Constitutional fact review*, 85 Colum L R 229 (1985). The author placed the *Bose* case within the context of numerous United States Supreme Court decisions establishing that "absent limiting legislation, federal appellate courts, particularly the Supreme Court" possess the authority to "sort out the relevant facts and apply to them the controlling constitutional norms." *Id.* at 238. Monaghan explained that independent review enabled the appellate court to "elaborate the governing norm." Monaghan, p 236. Since law application is "situation-specific" and norm elaboration is

often invisible or buried in a general verdict, Monaghan noted that unless appellate courts conduct independent review they are unable to carry out their law declaration function by providing general norm elaboration when they conclude that it is necessary.[21] In accord with Monaghan's view, the *Miller* Court emphasized the question of allocation of decision making embodied in the categorization of issues as fact/law or mixed fact/law questions.

We perceive an additional need for independent review grounded on the fear that juries may give short shrift to important First Amendment rights. The *Miller* Court recalled that the Court has tended to allocate decision making to appellate courts where necessary to avoid perceived shortcomings of the trier of fact and to allocate decision making to trial courts where the issue involves the credibility of witnesses. In the area of libel actions, we have acknowledged that independent review "reflects an inherent distrust of allocating unlimited decisional power to juries in the First Amendment context." *Locricchio*, *supra* at 114, n 20. Even Justice Rehnquist, who dissented in *Bose*, *supra*, conceded that the doctrine of independent review of facts "exists . . . so that perceived shortcomings of the trier of fact by way of bias or some other factor may be compensated for." 466 US at 518.

We therefore independently review the whole record in this case to consider whether material falsity was shown.

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21 **Monaghan suggests that although it is clear that appellate courts have the authority to conduct independent review, it is not clear that they have the duty to do so. He argues that the judicial role in preserving constitutional rights requires courts to "expound and refine the applicable constitutional law" and elaborate the constitutional norms when necessary. Monaghan, p 268.**

IV

The common law has never required defendants to prove that a publication is literally and absolutely accurate in every minute detail. For example, the Restatement of Torts provides that "[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."[22] Michigan courts have traditionally followed this approach.[23] At early common law, Michigan courts predicated a claim for libel on the question whether the article was substantially true. In *McAllister* v *Detroit Free Press*, 85 Mich 453, 460-461; 48 NW 612 (1891), this Court explained that liability could not be imposed for a slight inaccuracy:

> It is sufficient for the defendant to justify so much of the defamatory matter as constitutes the sting of the charge, and it is unnecessary to repeat and justify every word of the alleged defamatory matter, so long as the substance of the libelous charge be justified. . . . [A] slight inaccuracy in one of its details will not prevent the defendant's succeeding, providing the inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce . . . .

Thus, the test looked to the sting of the article to determine its effect on the reader; if the literal truth produced the same effect, minor differences were deemed immaterial.

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22 **3 Restatement Torts, 2d, § 581, comment f, p 237.**

23 **See, e.g., *Hay* v *Reid*, 85 Mich 296; 48 NW 507 (1891); *McAllister* v *Detroit Free Press*, 85 Mich 453; 48 NW 612 (1891); *McGuire* v *Vaughan*, 106 Mich 280; 64 NW 44 (1895); *Sanders* v *Evening News Ass'n*, 313 Mich 334; 21 NW2d 152 (1946).**

In contrast to the early common law, where falsity was presumed and the defendant was required to prove substantial truth as a defense, the burden of proving falsity has now been shifted to the plaintiff.[24] Despite this constitutionally required alteration in the allocation of the burden of proof, the definition of falsity remains based on the common-law doctrine. *Masson* v *New Yorker Magazine, Inc*, 501 US ___; 111 S Ct 2419; 115 L Ed 2d 447 (1991). In determining the falsity component of an actual malice finding, the United States Supreme Court grounded the concept of falsity on its historical definition of falsity in common-law libel. *Masson*, 111 S Ct 2432-2433. The Court explained:

> The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. . . . It overlooks minor inaccuracies and concentrates upon the substantial truth. . . . The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' . . . Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'

Although *Masson* pertained to the falsity component of an actual malice determination, it is clear that the constitutional requirement for testing falsity mirrors Michigan's common-law test.

The substantial truth doctrine is frequently invoked to solve two recurring problems: minor inaccuracies

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24 See *Philadelphia Newspapers, Inc* v *Hepps*, *supra*.

and technically incorrect or flawed use of legal terminology. This case raises both questions. The Court of Appeals held that "whether the article is read for its gist or simply for the information presented as fact, plaintiff has met his burden of proving falsity." 184 Mich App 32. In reaching this result, the Court of Appeals focused on the assertions that the article indicated that plaintiff was "charged" with the crime of first-degree criminal sexual conduct, sexual assault, that "charges" had been authorized by the prosecutor when no formal arraignment had occurred, and that the article suggested that "his children" identified him as the person who committed the crime when the identification was made by his former wife's children. We disagree.

In order to properly evaluate the falsity of the article, we have reproduced the language from the article as published in the newspaper followed by a version that contains language which corrects the inaccuracies complained of by the plaintiff.

This is the text of the report and headline published by the News & Enquirer of Battle Creek:

> Police arrest suspect in baby-sitter assault
>
> A 43-year-old man has been *arrested and charged* with the sexual assault of a 17-year-old woman who was babysitting with *his children* at his *ex-wife's house* on North Findlay Avenue in Bedford Township.
>
> The subject has been identified by Bedford Township Police as David J. Rouch of 631 Golden Avenue. He is free on a $10,000 personal recognizance interim bond pending his arraignment in District 10 Court next week. Rouch *is charged with* first-degree criminal sexual conduct.

Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said.

The victim later called a relative, who took her to Community Hospital and then called police. The suspect was *identified by his children*, according to police.

Rouch was arrested at his home by Emmett Township Police, who were informed where he lived by Bedford Township investigators.

The *charge* against Rouch *was authorized Friday by the Calhoun County Prosecutor's Office.*

The following version substitutes language that the plaintiff asserts should have been used in the article:

Police arrest suspect in baby-sitter assault

A 43-year-old man has been *arrested and accused* of sexual assaulting a 17-year-old woman who was babysitting with *his ex-wife's children* at her house on North Findlay Avenue in Bedford Township.

The subject has been identified by Bedford Township Police as David J. Rouch of 631 Golden Avenue. He is free on a $10,000 personal recognizance interim bond pending his arraignment in District 10 Court next week. Rouch *is accused of* committing first-degree criminal sexual conduct.

Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said.

The victim later called a relative, who took her to Community Hospital and then called police.

> The suspect was identified by *his ex-wife's children*, according to police.
>
> Rouch was arrested at his home by Emmett Township Police, who were informed where he lived by Bedford Township investigators.
>
> The Calhoun County Prosecutor's Office *authorized the incarceration* of Rouch on *allegations of criminal sexual conduct* in the first degree.

We cannot agree that the gist or sting of the article is changed by these minor differences.

The primary criticism that plaintiff raises is with the use of the word "charges," absent formal arraignment. The Court of Appeals concluded that the message conveyed to readers of the article by the several references to "charge" or "charges" was materially false. First, it interpreted this Court's opinion in *Rouch I* as requiring this result. It apparently concluded from the statement in *Rouch I* that "plaintiff was never formally charged" with the crime, that the use of the word "charged" was false. Second, it relied upon a textual analysis of the plain meaning of the word "charge," questioning the defendant's suggestion that "charge" is synonymous with "accuse." Conceding that *Webster's New World Dictionary of the American Language, Second College Edition* (1984), includes "accuse" as one of the possible meanings of "charge," the Court pointed out the additional listed term "indictment." It also referred to *The Random House College Dictionary, Revised Edition* (1984), which defined "charge" as "to accuse formally or explicitly" and as "an accusation." On the basis of these authorities, the Court reasoned that "charge" carries a more serious connotation than "accuse" and that the article's use of the term "in a much more specific and legal sense" was false. 184 Mich App 324. Finally, the Court of Appeals attempted to

draw an analogy with this Court's reasoning regarding the distinction between "proceedings" under the privilege statute and mere apprehensions.

We cannot agree with this reasoning. The linchpin of the Court of Appeals analysis is a formalistic interpretation of the word "charge" that belies any attempt to ascertain the "gist" or "sting" of the article to the lay reader. The United States Supreme Court has cautioned that recovery can be refused for "choice of language which, though perhaps reflecting a misconception, represented 'the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies.'" *Masson*, 111 S Ct 2434, quoting *Bose*, 466 US 513.[25]

Technical inaccuracies in legal terminology employed by nonlawyers such as those at issue here fall within this category. Numerous courts have rejected claims of falsity when based on a misuse of formal legal terminology.[26] We have recognized that the popular sense of

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25 The precise meaning and choice of words employed is a critical factor in any evaluation of the falsity. We are mindful of the inherent imprecision of language and the difficulties this poses to any evaluation of the truth or falsity of an article, particularly one that rests upon the use of a word with ambiguous implications. See, generally, Schauer, *Language, truth, and the First Amendment: An essay in memory of Harry Canter*, 64 Va L R 263, 268 (1978). Schauer contends that "the choice of language may be as much a part of the freedom protected by the first amendment as is the choice of the underlying propositions which that language expresses." To ensure the requisite "breathing space" for free and robust debate on matters of public concern, we think it important to allow for imprecision and ambiguity in the choice of language.

26 See, e.g., *Vachet* v *Central Newspapers, Inc*, 816 F2d 313, 316 (CA 7, 1987) (the gist of the article concerned the plaintiff's association with a suspected rapist because he was arrested for harboring a fugitive, but the "particulars of the arrest — whether it was pursuant to an arrest warrant or authorized by a state statute — are in-

(*concluded on page A-24*)

a term may not be technically accurate. See, e.g., *Bailey* v *Kalamazoo Publishing Co*, 40 Mich 251, 255-256 (1879). The Court reasoned:

> A prosecution before a justice is not in a technical sense an indictment, but it serves a similar purpose. Grand juries are seldom summoned now, and very few cases are tried at the circuit on indictment. Informations have generally superseded the old method. Yet we use the term 'indictment' in ordinary conversation and often in judicial opinions to express any criminal prosecution. The burden of this charge was that Bailey had been prosecuted for malfeasance, and we do not think there was any substantial variance between the charge and proof. The popular sense was made out by showing the prosecution for misconduct.

Thus, if technical and common parlance yield different interpretations of the same word, the constitutionally required breathing space affords protection of the writer's choice.

(*continued from page A-23*)

offensive details of secondary importance"); *Simonson* v *United Press Int'l, Inc*, 654 F2d 478 (CA 7, 1981) (use of the technical term "ruled" for remarks made by the judge during a sentencing hearing and of "rape" where the defendant had pleaded no contest to a charge of second-degree sexual assault was not enough to establish falsity); *Lambert* v *Providence Journal Co*, 508 F2d 656 (CA 1, 1975), cert den 423 US 828 (1975) (the use of the term "murder" where the defendant denied guilt did not constitute an actionable innuendo regarding his guilt despite the article's failure to use more neutral term like "homicide" or "shooting death"); *Piracci* v *Hearst Corp*, 263 F Supp 511 (D Md, 1966), aff'd 371 F2d 1016 (CA 4, 1967) (per curiam) (a newspaper report that the plaintiff was arrested for "possession of marijuana" was substantially accurate despite the fact that the actual charge was "delinquency due to the act of possessing marijuana").

Another typical example involved reports of statements made by a trial judge at a sentencing hearing of a defendant who had pleaded no contest to a charge of second-degree sexual assault. *Simonson* v *United Press Int'l, Inc*, 654 F2d 478, 479-480 (CA 7, 1981). The article had set forth the judge's comment regarding a "sexually permissive" community and questioning whether a severe sentence should be imposed on "an impressionable person 15 or 16 years of age," who responded. The plaintiff, the trial judge, was recalled from office after the report. He sued the newspaper for defamation, contending that its description of a sexual assault as "rape" and its use of the word "ruled" when describing the judge's comments constituted defamation. The *Simonson* court rejected this argument, noting that rape in its common usage included nonconsensual sex and that intercourse had occurred without the consent of the victim. The court further rejected the judge's contention that he never "ruled" that sexual assault was a "normal reaction to prevalent sexual permissiveness," but simply remarked on this during the hearing. Noting that a plain and ordinary meaning of "ruling" might include statements and comments made by a judge when sitting on the bench, the court rejected the judge's contention that his "rhetorical question' should not be seen as a ruling. *Id.* at 482.

Just as the judge in *Simonson* asserted that "ruling" should be reserved for words uttered by the judge as a formal decree and that "rape" should not be used for a no-contest plea to second-degree sexual assault, plaintiff asserts that "charge" should be limited to circumstances in which a formal arraignment has been held. As in *Simonson*, the word at issue in this case encompasses the formal legal sense as well as a broader lay sense. Just as the *Simonson* court concluded that use of a word in accord with one of its meanings could not be

deemed materially false, so too do we conclude that use of "charge" absent formal arraignment cannot be deemed materially false.

Not only does "charge" in a popular sense accord with the newspaper's use of the term, it accords with the legal description of the status of an arrestee before judicial process is issued. For example, the Legislature used "charge" to describe the disposition of a person following arrest without a warrant. See MCL 764.13; MSA 28.871(1).[27] Similarly, Michigan Court Rules use "charge" to mean accuse. See MCR 6.106(E)(8).[28] Panels of the Court of Appeals and this Court's Criminal Jury Instructions likewise use "charged" as a synonym for accusations made by the police in conjunction with arrests made without a warrant.[29] Thus, the popular and legal sense of the term "charge" may not be identical before the police act on an accusation; once the police act on an accusation, the popular and legal terms are synonymous.

Furthermore, both testimony and documents from the trial illustrate the numerous uses to which the word can be put. Plaintiff himself used "charge" at numerous

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27 The statute provides:

> A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is *charged* to have been committed, and shall present to the magistrate a complaint stating the *charge* against the person arrested. (Emphasis added.)

28 The rule provides that the court shall consider "the nature of the offense presently *charged* and the apparent probability of conviction" along with other factors when deciding whether a person is entitled to release on personal recognizance, conditional release, or release on money bail.

29 See, e.g., *People* v *Suchodolski*, 22 Mich App 389, 394-395; 178 NW2d 524 (1970). See also Michigan Criminal Jury Instructions (2d ed), § 3.5(4) (the "fact that the defendant is charged with a crime . . . is not evidence").

points in the proceedings to describe the accusations brought against him.[30] Furthermore, plaintiff conceded that "the article in question and its reference to the Plaintiff being arrested and being charged with CSC and thereafter released on bond were true."[31] In addition, the police reports used "charge" to describe the accusations against Rouch.[32]

The word "charge" is an umbrella term covering all stages of the charging process. It is used by the law in contradistinction to a conviction. Even if plaintiff's argument that "charge" connotes a more serious formal involvement of judicial process than "accuse" were correct as a matter of law, we think it apparent that the word may be used in a popular sense as a synonym for accuse. While one meaning of "charge" is simply "accuse," carrying it with no intimation of governmental involvement, here, if the word "charge" is measured by the gist of what happened, there was not only a charge

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30 Plaintiff testified that a police officer told him that he "was getting picked up on a sexual charge or something." He also stated that he asked "what the charge was" and was told "it was a sexual assault on a child." He further commented that he was told "that, you know, the charge that they — that I was being charged with." When asked when he understood that he was arrested and charged, plaintiff explained that he was told that "we're charging you with this, and that's what they said."

31 After trial, plaintiff apparently sought to shift the emphasis of his claim to the question whether, in publishing an account of his arrest, the article suggesting that he had actually committed the crime, rather than that the reporting of his arrest and subsequent release on bond included materially false details. The trial court considered this broader argument, but ultimately based its ruling on the narrower ground that the details in the article were materially false.

32 The Bedford Township police report stated that the "Bedford Township Police wanted Mr. Rouch picked up on this charge." The 10th District Court Bail Bond form also stated that Rouch had secured his release "from custody pending final disposition of the charge or charges."

or accusation by an individual, but a booking by the police, an authorization by the prosecution to lodge the suspect on the charge, and an involvement by the magistrate recognizing these actions. Thus, even if "charge" connotes the existence of governmental involvement, that was present here.[33]

At best, one might conclude that the use of "charge" in its technical formal sense was inaccurate. We cannot accept this as a basis for liability. To do so would totally eviscerate the "breathing space" that the constitution requires in order to protect important First Amendment rights. When writing about criminal justice or legal matters, newspapers would be forced to recapitulate technical legal terminology employed by courts or law enforcement personnel even where popular words might be clearer for the lay reader. Attempting to reframe legal documents and events with legal significance into popular or lay terminology would be fraught with peril, and newspapers would do so at their risk. As one court remarked, there is "no authority for plaintiff's contention that a newspaper article reporting a judicial proceeding must indicate every possible interpretation of every word used in a complaint or other legal document."[34]

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[33] **All the elements necessary to obtain a formal warrant were present. The only thing lacking was the officer's appearance before the magistrate to swear to what was in the complaint. In 1 Criminal Procedure, § 1.4, p 21, LaFave and Israel state that in "most jurisdictions, the post-arrest issuance of a warrant is viewed as an unnecessary formality, and the magistrate's finding of probable cause will combine with the complaint to authorize continuing custody."**

[34] ***Handelsman*** **v** ***San Francisco Chronicle*****, 11 Cal App 3d 381, 387; 90 Cal Rptr 188 (1970) (ruling that use of the criminal term "theft" was not substantially untrue despite the fact that the complaint involved a civil action for conversion). See also** ***Hopkins*** **v** ***Keith*****, 348 So 2d 999, 1002 (La App, 1977), writ not considered 350 So 2d 893 (La, 1977) (an article that reported that the plaintiff had been convicted for "running a gambling game" when he had merely forfeited bond on the charge was substantially true).**

We agree. Having conducted an independent review of the record to determine whether use of the word "charge" rendered the article materially false, we conclude that it did not.

Plaintiff's additional complaint falls within the second category of cases arising under the substantial truth doctrine, those that involve minor inaccuracies. Plaintiff protests the article's suggestion that he was identified by his children, rather than the children of his former wife. The Court of Appeals concluded that this constituted material falsity because it seemed to eliminate the possibility that there was a mistaken identification. We cannot accept this reasoning.

Numerous courts have considered the falsity of articles in which the gist of the story was accurate, but minor inaccuracies marred the report. *Drury* v *Feeney*, 505 So 2d 111 (La App, 1987), cert den 506 So 2d 1225 (1987), is illustrative. Despite the defendant's failure to report precisely the nature of the plaintiff's conviction, the court found that the article was substantially true. The article described the plaintiff's conviction of "21 counts of mail fraud to cheat insurance companies and his clients of money in car accident suits." Actually, the plaintiff had been convicted for failure to disclose to his clients a fee-splitting arrangement. In colorful language, the court concluded that the discrepancy was "an infinitesimal aberrant grain of sand hidden in an entire seashore of reprehensible conduct and truths . . . ." 505 So 2d 112.[35]

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35 **See also *Stevens* v *Independent Newspapers, Inc*, 15 Media L Rep 1097 (Del Super Ct, 1988) (a newspaper inaccurately reported that the plaintiff had used a state car to drive seventy-two miles to work when in fact the distance was only fifty-five miles); *Brueggemeyer* v *Associated Press*, 609 F2d 825 (CA 5, 1980) (news reports that the court ordered restitution might equal $700,000 were substantially**

(*concluded on page A-30*)

Like courts in other jurisdictions, Michigan courts have found substantial truth despite minor inaccuracies in the details of an article. *McCracken* v *Evening News Ass'n*, 3 Mich App 32; 141 NW2d 694 (1966), epitomizes the reasoning that undergirds such a finding. The defendant newspaper reported that the plaintiff was charged with "$100,000 fraud" when, in fact, he had altered construction invoices in an amount between $37,000 and $39,000. The Court of Appeals rejected the plaintiff's claim that the article was substantially untrue, noting that this constituted "an inaccuracy that does not alter the complexion of the affair and would have no different effect on the reader than that which the literal truth would produce." 3 Mich App 40.[36]

The essence of plaintiff's argument is that the statement in the article that his children had identified him would eliminate in the reader's mind the possibility of a mistake. We think the gist or sting of the article was that plaintiff was arrested on the basis of the identification of persons who knew him. While we might agree that a reader acquainted with the facts might have more reason to suspect the motives of the identifiers, this is an argument regarding the weight of the identification, not its truth or falsity.

(*continued from page A-29*)

accurate despite the fact that the case involved only 1400 customers with a right to press claims involving purchases that averaged only $500); *Gomba* v *McLaughlin*, 180 Colo 232; 504 P2d 337 (1972) (a newspaper account that accurately reported that the plaintiff assaulted an elderly gentleman, but misstated the geographic location where the assault occurred, was substantially true).

36 See also *Shutt* v *Harte-Hanks Communications, Inc*, 7 Media L Rep 2559 (ED Mich, 1981) (a headline inaccurately reported that during a blackout the plaintiff had used the city's generator to light his home, but in fact he had used it to power his home freezer).

In sum, neither of the asserted errors, taken individually or as a group, alters the gist or sting of the article. The sting of the article was that the plaintiff had been identified by persons to whom he was well known and was charged with CSC I. That is true. The question whether a formal warrant had been issued or an arraignment held, like the question whether it was his children or former stepchildren who identified him, did not affect the article's substantial truth. Thus, the Court of Appeals erred in affirming the trial court judgment on this issue.

V

After painstaking review of the whole record in light of Michigan libel law and the latest constitutional pronouncements on the subject, we conclude that the evidence was not sufficient to establish material falsity.

Accordingly, because we disagree with the reasoning and result of the Court of Appeals, we vacate its opinion and remand this matter to the trial court for entry of judgment in favor of the defendant.

/s/ Patricia J. Boyle
/s/ Robert P. Griffin
/s/ Conrad L. Mallett, Jr.
/s/ James H. Brickley

RILEY, J. (concurring)

Although I agree essentially with the opinion of the majority, I write separately to make the following observations.

I concur in the result reached by the majority that this Court has a constitutional duty to independently evaluate the evidence in defamation cases and that, in

this case, plaintiff failed to establish material falsity. I also agree with the majority that the decision of the Court of Appeals must be vacated. However, as a threshold matter, I suggest that plaintiff's failure to allege and identify in his pleading, supplemental pleading, and answers to defendant's interrogatories, specifically which statements he considered to be materially false and how the newspaper either was negligent or reckless in publishing the story, were proper grounds for summary judgment by the trial court.

I

In *Locricchio* v *Evening News Ass'n*, 438 Mich 84, 116; 476 NW2d 112 (1991), we reviewed our common-law precedent[1] and listed the four components required to state a cause of action for libel: (1) a false and defamatory statement of and concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. We also stated that a cause of action for libel requires a plaintiff to show defamatory meaning as well as falsity, fault, and publication. *Locricchio*, *supra* at 116. Inherent in these requirements is the well-established rule that a defamation plaintiff must plead with specificity who published the defamatory statement, when it was published, and, most importantly, a plaintiff must identify the precise materially false statement published. *MacGriff* v *Van Antwerp*, 327 Mich 200, 204-205; 41 NW2d 524 (1950). In *MacGriff*, we held that the plaintiff's failure to directly identify the defamatory statements entitled the defendant to summary judgment. *Id.* at 204. In subsequent

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[1] *Nuyen* v *Slater*, 327 Mich 654, 662, n *; 127 NW2d 369 (1964).

cases, the Court of Appeals routinely followed this rule by affirming trial court rulings that granted summary judgment to defamation defendants.[2]

In recent years, however, a conflict developed in the Court of Appeals over whether a general allegation of malice is sufficient to establish a genuine issue of material fact. The conflict betan with *Parks* v *Johnson*, 84 Mich App 162, 169; 269 NW2d 514 (1978), wherein a Court of Appeals panel held that because courts are liberal in finding the existence of a genuine issue of material fact, they should not grant summary judgment unless convinced that the claim cannot be supported at trial. The *Parks* rationale was disapproved, however, in *Hayes* v *Booth Newspapers, Inc*, 97 Mich App 758, 774-775; 295 NW2d 858 (1980); *Lins* v *Evening News Ass'n*, 129 Mich App 419, 435; 342 NW2d 573 (1983); *Dienes* v *Associated Newspapers, Inc*, 137 Mich App 272, 283; 358 NW2d 562 (1984); and again in *Kurz* v *Evening News Ass'n*, 144 Mich App 205, 213; 375 NW2d 391 (1985), vacated on other grounds 428 Mich 886; 403 NW2d 805 (1987). These panels of the Court of Appeals concluded that a plaintiff must plead specific facts in support of

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2 *De Guvera* v *Sure Fit Products*, 14 Mich App 201, 206; 165 NW2d 418 (1968) ("'[t]he law requires the very words of the libel to be set out in the declaration in order that the court or judge may judge whether they constitute a ground of action"'); *Pursell* v *Wolverine-Pentronix, Inc*, 44 Mich App 416, 421; 205 NW2d 504 (1973) (applying the *De Guvera-MacGriff* rule to slander actions); *Hernden* v *Consumers Power Co*, 72 Mich App 349, 356; 249 NW2d 419 (1976) (a plaintiff's failure to allege "where, when or to whom this statement [publication that the plaintiff was fired for lack of productivity] was published, or that there even was a publication to anyone other than the plaintiff himself"); *Ledl* v *Quik Pik Food Stores, Inc*, 133 Mich App 583, 589-590; 349 NW2d 529 (1984) (referring to *Hernden* and *Pursell* with approval, the *Ledl* Court held that the failure of a plaintiff to set forth with specificity the necessary elements of a defamation cause of action: the defamatory words complained of, the connection of the defamatory words with the plaintiff, and the publication of the alleged defamatory words, entitled the defendant to summary judgment).

showing actual malice to defeat a motion for summary judgment. The issue was settled until yet another panel held that *Parks* was correct; malice can be generally alleged and plaintiff should be given ample opportunity to demonstrate actual malice. *Grostick* v *Ellsworth*, 158 Mich App 18, 23; 404 NW2d 685 (1987). The *Grostick* decision was abandoned shortly thereafter in *Smith* v *Fergan*, 181 Mich App 594, 597; 450 NW2d 3 (1989). The *Smith* Court reaffirmed the principle that because the issue of actual malice is one for the jury, specific supporting facts must be alleged and general allegations of malice are, therefore, insufficient to establish a genuine issue of material fact. The *Smith* decision is now controlling authority, and under Administrative Order Nos. 1990-6, 1991-11, binding precedent. See *Gonyea* v *Motor Parts Federal Credit Union*, 192 Mich App 74, 80; 480 NW2d 297 (1991); *Prysak* v *R L Polk Co*, 193 Mich App 1, 14; 483 NW2d 629 (1992).

In a similar vein, MCR 2.111(B)(1), and its predecessor GCR 1963, 111.1(1) requires plaintiffs to state in their pleadings "[*a*] *statement of the facts*, without repetition, *on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims* the adverse party is called on to defend" (emphasis added). Failure to identy a false statement should result in summary disposition in favor of the defendant pursuant to MCR 2.116(C)(8).

II

In the instant case, plaintiff, deemed a private person implicated in a matter of public concern,[3] filed his com-

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[3] *Rouch* v *Enquirer & News of Battle Creek*, 427 Mich 157, 204; 398 NW2d 245 (1986).

plaint dated December 2, 1980, alleging that defendant defamed him by stating that he was arrested, charged, and released on $10,000 personal recognizance bond for sexually assaulting the baby-sitter of his children.[4] Shortly thereafter, defendant sent plaintiff a set of interrogatories requesting him to "[s]et forth separately each statement of fact in the article which Plaintiff alleges was false, separately quoting each alleged false statement of fact," and then to "describe the exact nature and extent of the alleged falsity." In his answers, plaintiff apparently understood this to mean that the issue of falsity went to the question whether he committed the assault, which he did not, and because he had not, the article was materially false.

Upon receiving the answers, defendant forwarded a supplemental set of interrogatories requesting plaintiff

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[4] Plaintiff's complaint, dated December 2, 1980, alleged the following facts.

> "3. That on or about December 22, 1979, said Defendant falsely and/or maliciously published an article concerning your Plaintiff in said newspaper and that the charges made therein were false and defamatory as follows: that Plaintiff was arrested and charged with the sexual assault of a 17-year old woman who was babysitting with Plaintiff's children at Plaintiff's ex-wife's residence; that Plaintiff was free on a $10,000 personal recognizance bond; that Plaintiff was charged with first-degree sexual conduct; that Plaintiff attacked said 17-year old woman and used a knife to cut her clothes off; that Plaintiff was identified as the person making said assault by his children.
>
> "4. That by said words, Defendant meant and was understood to mean that Plaintiff was the person who sexually assaulted and raped a 17-year old woman who was babysitting his children.
>
> "5. That said publication of said facts as they related to your Plaintiff were false."

Subsequently, plaintiff amended his complaint on December 19, 1980, alleging the same facts with the identical paragraphs.

to specifically describe which statement in the article was false. Plaintiff objected to the supplemental interrogatories, arguing that the question "deal[s] with legal principles or at least the application of facts to legal principles which only Plaintiff's attorney is qualified to answer . . . ." Defendant responded with a motion for summary judgment alleging first, that the article is substantially true — because the falsity issue did not relate to whether he committed the assault, but rather to whether the defendant's report of plaintiff's arrest was accurate — and, second, that it is privileged under Michigan's common-law qualified privilege and the official proceedings act, MCL 600.2911(3); MSA 27A.2911(3). Plaintiff also moved for summary judgment alleging that defendant admitted in its affirmative defense that the story was false, and, therefore, the only issue at trial was damages.

Calhoun Circuit Court Judge Stanley Everett denied both motions, but ordered plaintiff to answer defendant's supplemental interrogatories. At this hearing, Judge Everett recognized that plaintiff had failed to plead with specificity the defamatory statements published, how the statements related to him, and what was materially false within the statement. Judge Everett also recognized that the specificity requirement is needed in defamation pleadings, as it is in the ordinary negligence cases, to allow the parties to narrow their focus on the allegedly libelous statements and to determine if the article, taken as a whole, is materially false.[5]

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[5] **As he explained:**

> **"How is it different, Mr. Jereck, from the ordinary negligence case in which the interrogatory may say, specify what acts on the part of the defendant you claim were negligent?**

(*concluded on page A-37*)

Plaintiff's counsel again argued that his client's guilt or innocence of the underlying assault is determinative regarding whether the article is materially false. Defense counsel posited in response that "the Judge put his finger on it when [he] made the analogy to the negligence case. All that [plaintiff's] complaint says is that . . . the publication was made maliciously. Now, under the [Court] Rules, . . . there has to be some showing of falsity and knowledge of falsity, and so on, . . . to make out a case [for] libel . . . ."

Upon receiving plaintiff's answers to the supplemental interrogatories — which stated that the article was false because he did not commit the rape, and that defendant committed various omissions in publishing the story — defendant moved again for summary judgment. Defense counsel argued that "none of those answers state or raise any issue of malice in the sense that is applicable to this libel action."[6] Plaintiff responded by alleging that the article was not privileged under the official proceedings act, that the article was defamatory because it falsely accused him of a

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(*continued from page A-36*)

> **Now, the term negligence has a special meaning in the law, it is a little more [sic] — a little easier probably for the layman to recognize it than malice, as we're using it. But, he could easily say, I don't know what negligence is and, therefore, I can't — what the legal definition of negligence is, therefore, I can't answer your question, and avoid it."**

6 Defense counsel proceeded with the argument:

> **"Malice in this sense — in the State of Michigan, means malice in the sense of the *New York Times* v *Sullivan*, [376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964)]. That test has been reiterated in case after case in our courts; that where a publication is made by a news media of a newsworthy story, the burden is upon the plaintiff to establish that the publication was made with malice, that is, with knowledge**

(*concluded on page A-38*)

crime he did not commit, and that the paper failed to make an effort to assess the truthfulness of the report.

This time, Judge Everett granted defendant's motion. He based his conclusion on the fact that there was a qualified privilege to publish the story, and that plaintiff failed to specify in his answers to the supplemental interrogatories "any allegation which suggests that the statements were known to be false on the part of the people involved in its publication or with reckless disregard whether they were false or not."[7]

(*continued from page A-37*)

> of falsity or reckless disregard of falsity. It is our position, Your Honor, that none of the answers to the interrogatories that are on file in any way establish that at the time that the news story was published, that anyone at the newspaper knew that the matter — material was false or had reckless disregard of the falsity."

It is also important to recognize that defense counsel did not rely on the official proceedings act.

7 The court concluded with the following thoughts:

> "Now, many of the things set forth which you read, Mr. Jereck, relate to events after the publication which might very well go to damages and mitigating damages, but the fact as presented to the court at this time is that the reporter contacted the police, was given information, some of which, admittedly, was true; but the important point was false, and that is that there had been an authorization for a warrant charging the defendant with a specific criminal offense of some significance. I don't find anything that suggests there was an actual knowledge of the falsity of the statement or anything to suggest there was reckless disregard of the truthfulness or falsity of the statements. Consequently, I am satisfied — and I am relying on particularly on *Schultz* v *Newsweek, Incorporated* [668 F2d 911 (CA 6, 1982)] which is the most recent decision which has been called to my attention, at least, in this evolving state of law. I am satisfied that (1) there is a qualified privilege, (2) that no suggestion has been made on the part of the plaintiff that he can substantiate malice; and, therefore, that the defendant is entitled to have the matter dismissed by way of summary judgment."

BEST AVAIL

III

Thus, I write separately to indicate my agreement with the trial court and to emphasize my belief that although this Court abandoned the "actual malice" standard for private person-public interest defamation actions in *Rouch I*[8] and adopted the "negligence" standard of liability, defendant was, nevertheless, entitled to summary disposition, as a matter of law, on the basis of our common-law precedent[9] and our court rules.[10] The relatively simple requirement of pleading facts to support allegations of material falsity, negligence, or reckless disregard for the truth should be followed by plaintiffs in defamation actions, and, pursuant to MCR 2.116(C)(8), defendant should have been entitled to summary disposition on this ground alone a decade ago.

/s/ Dorothy Comstock Riley
/s/ Robert P. Griffin

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8 *Rouch*, n 3 *supra*.

9 *MacGriff*, *supra* at 204-205.

10 MCR 2.111(B)(1). See also Niehoff, *The Michigan law of Defamation*, 1985 Det C L R 975, 980-982.

CAVANAGH, C.J. (*dissenting*).

I respectfully dissent. I agree that the correct legal test is one of material falsity and that the court is required to conduct an independent review of the record. I disagree, however, with the majority's conclusion that there is insufficient evidence of material falsity.

I

The disputed article in this case does contain inaccuracies. The defendant concedes that the plaintiff was

not identified by his own children, but by his ex-wife's children. In addition, the article's assertion that the plaintiff was "arrested and charged" was inaccurate if "charged" is interpreted to mean subjected to formal charges. And, perhaps most significantly, there were never any charges "authorized by the Calhoun County Prosecutor's Office." Under long-established principles of defamation law, however, the issue is not merely whether there are inaccuracies but whether the inaccuracies constitute material falsity.[1] The test is whether the evidence supports the finding that the article was materially false in that the "sting" of the article would have a different effect upon the mind of the reader than would the literal truth.

In determining whether the concededly false aspects of the publication are significant, for defamation purposes, in relation and comparison to the concededly

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[1] **The Court of Appeals stated that this Court had rejected the approach requiring material falsity:**

> **"Our dissenting colleague . . . finds that not only must the disputed statements be proven false, they must be false in a material aspect. Under this analysis, if the gist, or sting, of the article is substantially true, the falsity test is not met. The earlier Supreme Court opinion in this case specifically rejected this approach: '[W]e decline to distinguish, as did the Court of Appeals, the essence of the article from its supporting facts or details.' 427 Mich 204." 184 Mich App 31-32.**

This Court in its earlier *Rouch* opinion, however, did not even address the issue of material falsity. The language quoted by the Court of Appeals is taken out of context. In the quoted passage, this Court was discussing whether the article constituted speech of public concern, not whether the falsity must be a material one. Nevertheless, the Court of Appeals applied the test for material falsity and concluded that the plaintiff should prevail under either test:

> **"[W]hether the article is read for its gist or simply for the information presented as fact, plaintiff has met his burden of proving falsity." *Id.* at 32.**

Accordingly, this error by the Court of Appeals does not require reversal.

true portions, the inquiry necessarily goes beyond the strictly factual level and requires interpreting the likely effect of the publication on the reader's mind, and the likely meaning conveyed. But as the Court in *Locricchio* v *Evening News Ass'n*, 438 Mich 84, 112, n 17; 476 NW2d 112 (1991), recognized, "in reviewing a libel verdict an appellate court does not and should not exercise review of credibility determinations, disregard previous factfindings, or create new factfindings. Rather, the court should exercise independent judgment regarding whether, as a matter of constitutional law, the evidence in the record supports the verdict." Similarly, the United States Supreme Court has declared:

> "Indeed, it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review . . . . The independent review function is not equivalent to a 'de novo' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff." *Bose Corp* v *Consumers Union of United States, Inc*, 466 US 485, 514, n 31; 104 S Ct 1949; 80 L Ed 2d 502 (1984).

The task before this Court, therefore, is to undertake an independent review of the record and make a judgment regarding whether the evidence supports the finding that this article was materially false. While the standard calls for "independent appellate review," and this Court is not constrained to agree with the jury, it is important to recognize that in this case a jury, adequately instructed with respect to the need for material falsity, has reached a conclusion regarding the likely effect of the article at issue on the mind of the average

reader.[2] Indeed, when the entire newspaper article consists of only ten sentences, and those ten sentences contain six factual inaccuracies, this Court should not lightly overturn the jury's conclusion that the overall effect was materially false.

II

Turning now to a review of the evidence in this case, the Court of Appeals declared that the article was materially false in two respects: (1) by inaccurately stating that the plaintiff had been identified as the assailant by his own children when in fact it was his former stepchildren who had identified him and (2) by stating several times that plaintiff was arrested *and* charged with sexual assault when he was in fact merely arrested. As a purely factual matter, the statement that the plaintiff's own children had identified him as the assailant was false; the question, however, is whether it was a materi-

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[2] **The trial court's instructions to the jury included:**

> **"Secondly, that statements in the article were false. In deciding whether any statements in the article were false, you must interpret the words according to their ordinary and obvious meaning. You must give the words the fair and reasonable interpretation that an average reader would give them. You need not look at words used in the article according to any technical or legal definition. Whether the statements in the article were false is for you to decide after considering the statements in the article, in the light of all of the evidence in the case.**
>
> **"Thirdly, the Plaintiff *must prove that false statements in the article were materially false* and tended to harm the Plaintiff's reputation. *That is, that they made the article libelous.* In determining whether an article is libelous, it is necessary to read the article as a whole, and fairly and reasonably construe it *in determining whether the false portions make the article libelous in character.*" (Emphasis added.)**

Furthermore, the jury was given a special verdict form in which it was asked, in part: "Were the statements materially false, tending to harm the plaintiff's reputation, that is, did they make the article libelous?"

ally false statement; would it create a different impression in the mind of the reader than would the actual truth? I would conclude that the evidence supports such a finding. A man's children would presumably know him very well by sight, and their reported identification of him would likely be treated by the reader as deserving of exceptional credibility because it "would seem to eliminate the possibility that there might have been a mistaken identification." 184 Mich App 36. In light of the "sting" of the entire article, that there was more involved than a mere apprehension of a suspect, this statement would have had a strong effect on the mind of the reader. This Court previously declared that both the fact of the arrest and "the facts used to establish the probable cause for the arrest" are of public concern. *Rouch I*, 427 Mich 206. Certainly identification by one's own children would affect probable cause for the arrest and, in determining whether the reasons for the arrest were materially false, the misidentification of the stepchildren as children is not inconsequential. Even if this question is seen as a close one, I cannot conclude that the reader would not have a different reaction than if the literal truth had been reported. Therefore, the jury's determination should stand.

The second aspect of falsity flows from the declaration that the plaintiff was "charged" with criminal sexual conduct. As a legal matter, it was inaccurate to state that the plaintiff had been "charged." In fact, no warrant had been issued by the prosecutor, the plaintiff had not been arraigned, and there had been no judicial determination of probable cause; the plaintiff was merely arrested and booked on suspicion of the crime.

As a preliminary matter, the dissenting judge on the Court of Appeals is correct in maintaining that "newspapers should not be held to technical legal language.

Instead, they should be held to the use of words as they are customarily and popularly used." 184 Mich App 53 (opinion of Allen, J.). But even in light of common, colloquial usage by nonlawyers and the general public, when the article declared that the prosecutor had authorized the charge, the allegations became one of formal charges, not merely suspicion.[3] The effect on the mind of the reader was materially different from the effect that would have resulted from the actual truth. Indeed, the last sentence of the article strongly suggests that the term "charged" was being employed in the formal sense; the article claimed that "[t]he charge against Rouch was authorized Friday by the Calhoun County Prosecutor's office." Within this context the term "charge" would normally be interpreted to mean formal charges. Since no formal charges were ever pursued, this could properly have been considered by the jury to constitute a material falsity.

A final note in this area is that I believe it is inappropriate for the majority to focus merely on the definition of the single word "charge." Slip op at 23.[4] Michigan's

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[3] **The Court of Appeals eloquently summed up the evidence on this point:**

> **"The plain language *and* clear implication of the *Enquirer* article are that there was more than a simple accusation against plaintiff. The article says twice that the plaintiff was charged with a sex crime, and the final paragraph says that the prosecutor's office authorized the charge. The prosecutor, as is *commonly known* and as noted by the trial judge, does not just accuse; the prosecutor authorizes formal criminal proceedings, and that is exactly what the article says happened. There can be no doubt that both the details as reported and the gist of the article say that plaintiff was formally charged with a serious crime, not that there was merely an accusation of wrongdoing." 184 Mich App 34-35 (first emphasis in original, second emphasis added).**

[4] **The Court of Appeals also rejected the argument based on the definition of the word "charge" considered in isolation:**

(*concluded on page A-45*)

law of libel requires an examination of the article as a whole. See *Gustin* v *Evening Press Co*, 172 Mich 311, 314; 137 NW 674 (1912) ("To test its libelous quality, a publication must be considered as a whole . . ."); *O'Connor* v *Sill*, 60 Mich 175, 181; 27 NW 13; 27 NW 162 (1886) ("The article . . . must all be read together. Parts of it cannot be severed . . ."). Read as a whole, the article conveyed the impression that there was overwhelming evidence and that judicial proceedings had been instituted against Rouch. The effect of this on the mind of the reader is different from that of a "mere apprehension." *Rouch I*, 427 Mich 172. The "sting" that results from this impression of formal charges created a substantially different effect on the mind of the reader. The evidence demonstrated, and the jury obviously found, that the article as a whole conveyed an impression quite different from that which the actual truth would have produced.

I would affirm the judgment of the Court of Appeals.

/s/ Michael F. Cavanagh
/s/ Charles L. Levin

(*continued from page A-44*)

> **"The dissent in this case says that the common usage of the word 'charge' means 'accuse' and that plaintiff was accused of the assault and so the article was not false. There are problems with this line of reasoning . . . . [W]e do not agree that the commonly understood meaning of the word 'charge' is merely to accuse. *Webster's New World Dictionary of the American Language, Second College Edition* (1984), includes 'accuse' in its definition of 'charge,' but it also includes the term 'indictment,' a word of far more serious import and implications. Indeed, 'indictment' implies a formal *criminal* accusation . . . .**
>
> **"Even if we were to accept the proposition that the common usage of the term 'charge' relates only to an accusation, the article, as written, and particularly the last paragraph, certainly uses the term in a much more specific and legal sense." *Id.* at 33-34.**

LEVIN, J. (*separate opinion*).

I have signed the Chief Justice's opinion.

I

While I fully agree with the Chief Justice that "it is inappropriate for the majority to focus merely on the definition of the single word 'charge,'"[1] I would be inclined to conclude that it is not defamatory in itself to describe an arrest as a "charge" — to say that a person who has been arrested has been charged, rather than to say that he has been arrested.

The news article here in question, however, said more. The article said that Rouch had been "arrested and charged," and that "[t]he charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office."

Arrests are often made by police officers without prior authorization from the prosecutor. The import therefore of a news article describing an arrest merely as a "charge" is significantly different than the import of an article stating that a person has been "arrested and charged" and that the "charge" "was authorized" by the prosecutor. In stating that Rouch had been arrested and charged, and that the charge was authorized by the prosecutor, the news article implied that the governmental official responsible for the administration of justice had concluded that Rouch should be arrested and charged. This suggests more than an ordinary arrest by a police officer.

The majority dwells at length on the meaning of "charge." The sentence stating that the charge "was authorized" by the prosecutor significantly changed the

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[1] Slip op, p 7.

import and sting of the article. As stated by the Chief Justice, the article read as a whole conveyed "the impression that there was overwhelming evidence and that judicial proceedings had been instituted against Rouch."[2]

Rouch was arrested and detained at 5:25 a.m. by police officers without prior authorization by the prosecutor. After Rouch arrived at the station house, a police officer telephoned an assistant prosecutor who authorized the officer to further detain Rouch.[3] The prosecutor had not, and did not later authorize the filing of a "charge." That afternoon, Rouch was taken before a magistrate and released from custody.

A reasonable factfinder could conclude that the statements in the news article, that Rouch had been "arrested and charged" with first-degree criminal sexual conduct and that the "charge against Rouch was authorized" by the prosecutor, implied[4] falsely that a prosecutor had authorized the police to arrest Rouch on charges of CSC-1.

II

The concurring opinion overlooks the distinction between stating a cause of action and providing a

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2 Slip op, p 7.

3 The police report states that the assistant prosecutor "was briefed on the complaint and the *circumstances surrounding the arrest of suspect.* He advised to lodge the suspect on CSC 1st."

4 "The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." *Milkovich* v *Lorain Journal Co*, 497 US —, —; 110 S Ct 2695; 111 L Ed 2d 1, 19 (1990).

"statement of the facts, without repetition, on which the pleader relies in *stating the cause of action.*"[5]

A motion of the Enquirer and News of Battle Creek seeking summary disposition on the ground that Rouch had "failed to state a claim on which relief can be granted"[6]

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5 MCR 2.111(B)(1).

6 MCR 2.116(C)(8).

The actual motion for summary disposition filed by the Enquirer and News reads as follows:

> "Now Comes Defendant Enquirer & News of Battle Creek, Michigan, a Delaware corporation, through its attorneys, Sullivan, Hamilton, Ryan & Schulz and moves the Court that an Order be entered granting a summary judgment of no cause for action in favor of Defendant and against Plaintiff in this case. This Motion is the renewal of a Motion previously filed in this action and the statements contained in the original Motion are herein incorporated by reference as though the same were set forth word for word.
>
> "That the hearing on the Motion for Summary Judgment originally filed was held in conjunction with a hearing on a Motion to compel Plaintiff to answer certain interrogatories dealing with Plaintiff's assertion of malice on the part of Defendant.
>
> "That the Court denied the Motion for Summary Judgment and at the same time entered an order requiring Plaintiff to answer Defendant's interrogatories.
>
> "That Plaintiff has filed answers to interrogatories and the same are part of the files and records of this case.
>
> "That said answers to interrogatories do not contain any factual statements or allegations which, if proved, would establish that Defendant published the article with knowledge that it was false or with reckless disregard of whether it was false or not and, therefore, do not raise any issues of fact on the question of malice.
>
> "That the article in question is a substantially true report of a matter of general public interest.
>
> "That the published information was obtained from police officials, upon whom Defendant had the right to rely.
>
> "That the publication is entitled to qualified privilege under the laws of this state and, therefore, in the absence of proof of malice, cannot be the basis for a judgment in an action for libel."

could not properly be granted because of any failure in the complaint filed by Rouch adequately to state the facts on which he relied in seeking to state a cause of action.

A claim that a pleader has failed adequately to state facts may be raised at the trial level by a motion to correct or strike pleadings pursuant to MCR 2.115. If the motion is granted, the pleader may as of course file an amended pleading more fully stating the facts on which the pleader relies.[7]

The plaintiff's answers to interrogatories fully supported the cause of action stated in the complaint.[8]

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7 MCR 2.115 and MCR 2.116(I)(5).

8 The interrogatories directed to plaintiff read as follows:

"Interrogatories Directed to Plaintiff

"You are hereby notified that within fifteen (15) days from the time of service upon you, you shall answer separately, fully, in writing and under oath, each and every of the following interrogatories in accordance with the provisions of General Court Rule No. 309, and various subsections thereof.

"These interrogatories shall be deemed continuing and supplemental answers thereto shall be required immediately upon receipt thereof, if the Plaintiff directly or indirectly obtains further or different information, from the time the answers are served to the time of trial.

"1. Set forth separately each statement of fact in the article which Plaintiff alleges was false, separately quoting each alleged false statement of fact.

"2. With respect to each statement of fact set forth in response to Interrogatory No. 1, describe the exact nature and extent of the alleged falsity.

"3. Specify whether Plaintiff intends to rely upon a claim of common law malice, as implied by law in favor of Plaintiffs in libel actions, or upon an affirmative claim of actual malice on the part of Defendant in publication of the alleged defamatory statements.

"4. If affirmative evidence of actual malice (as opposed to the common malice implied by law in favor of plaintiffs

(*continued on page A-50*)

A claim that the facts have not been adequately stated cannot properly be raised after the trial has

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(*continued from page A-49*)

in libel actions) will be introduced at trial of this action, set forth separately and describe fully each item of evidence of fact upon which plaintiff will rely to establish actual malice on the part of Defendant Enquirer & News of Battle Creek.

"5. If Plaintiff contends that the false statements of fact in the article were published with reckless disregard on the part of Defendant Enquirer & News of Battle Creek, set forth each item of evidence upon which Plaintiff will rely to establish such reckless disregard."

The answer to interrogatories reads as follows:

"Answer to Interrogatories

"Now comes the above-named Plaintiff who being first duly sworn deposes and says in answer to Defendant's Interrogatories as follows:

"1. a. Plaintiff was taken into custody with regard to an alleged offense, but was never formally charged with any offense.

"b. Plaintiff was never charged with the sexual assault of a 17-year-old woman.

"c. 17-year-old woman was not babysitting Plaintiff's children.

"d. Plaintiff was never formally charged with first-degree sexual conduct.

"e. Plaintiff never entered the house at 4:00 a.m. Friday and attacked a young woman.

"f. Plaintiff never used a knife to cut victim's clothes off.

"g. Plaintiff was not identified by any of his children as being the alleged assailant.

"h. No formal charges were authorized by the Calhoun County Prosecuting Attorney's office.

"2. All of the items set forth in Paragraph 1 are false.

"3. My attorney advises me that we intend to rely on both the claim of common law malice and an affirmative claim of actual malice.

(*continued on page A-51*)

commenced, let alone for the first time in the Supreme Court and without even an assignment of error. Ordi-

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(*continued from page A-50*)

"4. My attorney advises me that he has not completed discovery and, therefore is not able to answer this question at this time.

"5. My attorney has not completed his investigation and, therefore, I cannot answer this question at this time."

Plaintiff's answers to defendant's supplemental interrogatories read as follows:

"Plaintiff's Answers
to Defendant's Supplemental Interrogatories

"Now comes the above-named plaintiff, David J. Rouch, who being first duly sworn, deposes and says as follows:

"1. In answering these Interrogatories, based on what I have been told by my attorney, that actual malice (knowledge of falsity of statements made or reckless disregard of their truth or falsity) and common law malice or malice in law (false and defamatory statements made without sufficient cause or excuse) are more often than not supported by the same factual basis except in ususual instances. He further advised that in ordinary cases, malice can be implied from the defamatory nature of the statements and the fact that they are false. Malice can be proved by both intrinsic evidence and extrinsic evidence. Therefore, I am unable to necessarily distinguish whether the following facts will suport [sic], as you say, 'actual malice' or 'common law malice,' but are those facts as I best know them at this time which I will rely on in support of my Complaint:

"a. That the article was false;

"b. The style and tone of the original article and the alleged retraction;

"c. That normally the names of criminal defendants are not published by the Defendant newspaper until the criminal defendant has been formally charged or arraigned in Court;

"d. That the Defendant failed to publish the fact that no formal chargesd had been brought against the Plaintiff and that he had been released from custody until approximately one year later when Plaintiff made a demand for retraction upon Defendant;

(*concluded on page A-52*)

narily, the allegations in the complaint are fleshed out during the discovery process, at status conferences, and in mediation statements. The approach of the con-

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(*continued from page A-51*)

"e. That the Defendant did not publish the fact that another individual was arrested for the same charges subsequent to Plaintiff's release, at the time of his arrest;

"f. That Plaintiff is not a public or quasi-public person;

"g. That the publication in question was not a qualified or absolute privilege of the Defendant;

"h. That prior to publishing the article in question, Defendant made no investigation whatsoever to determine whether or not the facts as published were true;

"i. That Defendant only made a telephonic inquiry of police departments to acquire the information published;

"j. That Defendant made no effort to determine the truthfulness of the charge or facts contained in the publication;

"k. That Defendant made no effort to contact Plaintiff concerning the facts as published;

"l. That no immediate necessity existed which would have justified the libelous publication of the article in question without making reasonable efforts to confirm the truthfulness of the facts set forth in the publication;

"m. That Defendant has no standards, instructions, or guidelines to protect private citizens such as the Plaintiff from libelous publications;

"n. That despite a remand from Plaintiff, Defendant failed to publish a retraction;

"o. That Defendant has not at any time, by conduct or otherwise, demonstrated the slightest interest or concern or Plaintiff's rights prior to or subsequent to the publication in question.

"2. See #1 above.

"3. See #1 above.

"4. See #1 above.

"5. See #1 above."

curring opinion, if observed generally, would elaborate on motion practice, to the dismay of bench and bar, and would needlessly increase the paper flow and the already heavy cost of litigation.

III

The Enquirer and News moved for a remittitur of the $1,000,000 verdict, which was denied. The denial was assigned as error in the Court of Appeals. The Court of Appeals, on consideration of this Court's decision in *Palenkas* v *Beaumont Hosp*, 432 Mich 527; 443 NW2d 354 (1989), concluded that the judge did not err in denying a remittitur. The Enquirer and News did not challenge that conclusion in this Court.

/s/ Charles L. Levin

ORDER DENYING REHEARING

(State of Michigan — Supreme Court)

(Entered August 24, 1992)

(DAVID J. ROUCH, Plaintiff-Appellee, v ENQUIRER & NEWS OF BATTLE CREEK MICHIGAN, A Delaware Corporation, Defendant-Appellant — SC: 89799; CoA: 108595; LC: 80-1263 CZ; 87-412 CZ; Rehearing No. 273)

Michael F. Cavanagh, Chief Justice;
Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

(Certification Omitted)

ORDER FOR JUDGMENT NOTWITHSTANDING VERDICT

(State of Michigan – Circuit Court – County of Calhoun)

(Dated September 9, 1992)

(DAVID J. ROUCH, Plaintiff, v ENQUIRER AND NEWS OF BATTLE CREEK, MICHIGAN, a Delaware Corporation, Defendant — Circuit Court Numbers: 80-1263 CZ 87-412 CZ; Michigan Supreme Court No.: 89799; Court of Appeals No.: 108595; HON: STEPHEN B. MILLER)

At a session of said Court, held in the Circuit Court-rooms in the City of Battle Creek, Michigan, this 9th day of September, 1992,

PRESENT: HONORABLE STEPHEN B. MILLER, CIRCUIT JUDGE

THE ABOVE entitled case having been tried and the jury having rendered its verdict in favor of Plaintiff and against Defendant, and upon appeal to the Michigan Supreme Court, that Court having entered its order remanding this matter to this court for entry of a judgment in favor of Defendant and against Plaintiff notwithstanding the verdict of the jury previously entered, and a Motion for Rehearing having been filed in the Supreme Court by Plaintiff-Appellee and the Court having entered its Order denying said Motion for Rehearing under date of August 24, 1992.

IT IS ORDERED that notwithstanding the verdict of the jury, that Plaintiff recover nothing against Defendant, and judgment be entered in favor of Defendant, dismissing Plaintiff's action with prejudice, with costs to be taxed.

IT IS FURTHER ORDERED that the stay bond on appeal, given by Defendant as principal and Continental Casualty Company as surety under date of April 28, 1988, be and the same is hereby cancelled and set aside, and

neither the principal nor surety shall have any further obligation under said bond.

/s/ Honorable Stephen B. Miller,
Circuit Judge

(*Certification Omitted*)

PROCEEDINGS IN THE CALHOUN COUNTY, MICHIGAN CIRCUIT COURT, BEFORE STANLEY EVERETT, JUDGE, ON JUNE 7, 1982 (RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT)

(State of Michigan – Circuit Court – County of Calhoun – File No. 80-1263CZ)

* * *

(14) * * * THE COURT: Well, I think we are all aware of the fact the law as relates to libel and privilege of the newspaper has changed substantially, and while at one time qualified privilege which you are arguing here may have been limited to public persons, it certainly appears to me that it does not at this time. In Schultz, the court said the privilege attaches to reports on matters of general public interest (15) even though the plaintiff is a private individual. Incidentially, I don't find anyplace in which they refer to newsworthy accounts, but rather matters of general public interest. That seems to me clear the reporting of arrests on criminal proceedings involving charges is a matter of general public interest.

Now, it is, of course, a qualified privilege, and it does not protect the paper where there was malice as that term is used in the law of libel; and that means more than — or is not limited to personal hostility or dislike of the person about whom the matter is published, but rather extends to the fact defendants acted with knowledge that the statements objected to were false or reckless disregard whether they were false or not. I don't find in the answers to the interrogatories any allegation which suggests that the statements were known to be false on the part of the people involved in its publication or with reckless disregard whether they were false or not. Now, many of the things set forth which you read, Mr. Jereck, relate to events after the publication

which might very well go to damages and mitigating damages, but the fact as presented to the court at this time is that the reporter contacted the police, was given information, some of which, admittedly, was true; but the important point was false, and that is that there had been an authorization for a warrant charging the defendant (16) with a specific criminal offense of some significance. I don't find anything that suggests there was an actual knowledge of the falsity of the statement or anything to suggest there was reckless disregard of the truthfulness or falsity of the statements. Consequently, I am satisfied — and I am relying on particularly on Schultz vs. Newsweek Incorporated, which is the most recent decision which has been called to my attention, at least, in this evolving state of law. I am satisfied that (1) there is a qualified privilege, (2) that no suggestion has been made on the part of plaintiff that he can substantiate malice; and, therefore that the defendant is entitled to have the matter dismissed by way of summary judgment.

Now, having said that, I cannot preclude the defendant from — or would not seek to preclude him from, if he is able to do so, find some evidence by way of — some sworn evidence to refute the claims of the reporter in this case, but it's kind of like filing an amended complaint, I guess. You certainly have the right to do it here. You'd have to file something beyond — something beyond the complaint to challenge the affidavit. If you wish the opportunity to do it, I would say summary judgment will enter in thirty days unless additional material is submitted on the part of the plaintiff to establish malice in this case.

ORDER FOR SUMMARY JUDGMENT

(State of Michigan – Circuit Court – County of Calhoun)

(Dated June 14, 1982)

(DAVID J. ROUCH, Plaintiff, vs ENQUIRER & NEWS OF BATTLE CREEK, MICHIGAN, a Delaware corporation, Defendant — File No. 80-1263 CZ)

At a session of said Court, held in the Circuit Courtrooms in the City of Marshall, Michigan, this 14 day of June, 1982,

PRESENT: HONORABLE STANLEY EVERETT, Circuit Judge

This matter having come on to be heard upon Defendant's Motion for Summary Judgment and Affidavits and Exhibits and Briefs having been filed and the Court having heard arguments of counsel and it having been made to appear to the Court that Plaintiff has not raised a genuine issue of material fact on the question of malice on the part of the Defendant and the Court having dictated its finding upon the record and the Court being fully advised in the premises,

IT IS ORDERED that summary judgment of no cause for action be entered in favor of Defendant and against Plaintiff. This Order for Summary Judgment shall be of full force and effect, unless Plaintiff shall, within thirty (30) days of the date of this Order, file additional material sufficient to establish a genuine issue of material fact on the question of malice on the part of Defendant and, in default thereof, this Order shall stand as a judgment of no cause for action in favor of Defendant and against Plaintiff.

/s/ Stanley Everett,
Circuit Judge

(*Certification Omitted*)

PROCEEDINGS IN THE CALHOUN COUNTY, MICHIGAN CIRCUIT COURT, BEFORE STANLEY EVERETT, JUDGE, ON JULY 19, 1982 (RE: RECONSIDERATION OF SUMMARY JUDGMENT FOR DEFENDANT)

(State of Michigan – Circuit Court – County of Calhoun – File No. 80-1263CZ)

* * *

(7) * * * THE COURT: If you are correct on that, you are going to win your appeal, Mr. Jereck; but I'm satisfied that the law is, under the circumstances of this case, there is a privilege, that there must be a showing of malice. The only issue which has been argued — or really has been argued recently until your final comments, is there any basis within the complaint or the proceedings up until this point which could indicate that you have the prospect of setting forth facts fro which it could be concluded there was malice as that term is defined in the libel law, and I haven't been shown that which I believe could satisfy the requirements of malice, that there are proofs which would support it. Now, if malice is not in the case, that is a mistake on my part; but if it is, I don't think there's any basis that you have shown to this date that there can be proofs to support that.

MR. JERECK: Just for the record, you say you find (8) there's a privilege.

THE COURT: I think there is, yes.

MR. JERECK: What privilege is that, so everybody can have the benefit of that.

THE COURT: What do you mean, what kind of privilege?

MR. JERECK: Conditional privilege we are dealing with or —

THE COURT: It was simply a newsworthy event which they had the right to publish.

MR. JERECK: I just want the record to be clear on that your Honor, where you found privilege.

THE COURT: I guess the last time on that, I allowed a certain period of time before judgment would enter. I don't see any reason to hold it up further.

MR. JERECK: I don't either, your Honor.

THE COURT: Have you prepared an order?

MR. SULLIVAN: I have not, your Honor.

THE COURT: All right, if you will prepare it.

ORDER DENYING MOTION FOR RECONSIDERATION

(State of Michigan – Circuit Court – County of Calhoun)

(Dated July 26, 1982)

(DAVID J. ROUCH, Plaintiff, vs ENQUIRER & NEWS OF BATTLE CREEK, MICHIGAN, a Delaware corporation, Defendant — File No. 80-1263 CZ)

At a session of said Court, held in the Circuit Courtrooms in the City of Battle Creek, Michigan, this 26th day of July, 1982,

PRESENT: HONORABLE STANLEY EVERETT, Circuit Judge

On reading and filing Plaintiff's Motion for Reconsideration of the Order for Summary Judgment previously entered in this case and the Brief in support thereof and Defendant's Answer and Brief in Support of Answer and the Court having heard arguments of counsel and the Court being fully advised in the premises,

IT IS ORDERED that the Plaintiff's Motion for Reconsideration be and the same is hereby denied.

/s/ Stanley Everett,
Circuit Judge

OPINION

(State of Michigan — Court of Appeals)

(Filed September 4, 1984)

(DAVID J. ROUCH, Plaintiff-Appellant, -v- ENQUIRER & NEWS OF BATTLE CREEK, MICHIGAN, a Delaware corporation, Defendant-Appellee — No. 66177)

BEFORE: R. M. Maher, P.J.,
and R. S. Gribbs and K. N. Sanborn,* JJ.

SANBORN, J.

On June 14, 1982, the trial court granted summary judgment for defendant on the basis that plaintiff could not prove that defendant acted with actual malice in the publication of a defamatory news item. Plaintiff appeals as of right.

On December 22, 1979, defendant printed the following story under the headline, "Police arrest suspect in baby-sitter assault":

> "A 43-year-old man has been arrested and charged with the sexual assault of a 17-year-old women [*sic*] who was baby-sitting with his children at his ex-wife's house on North Finlay Avenue in Bedford Township.
>
> "The suspect has been identified by Bedford Township police as David J. Rouch [plaintiff in the present case] of 631 Golden Ave. He is free on a $10,000 personal recognizance interim bond pending his arraignment in District 10 court next week. Rouch is charged with first-degree criminal sexual conduct.

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* Circuit judge, sitting on the Court of Appeals by assignment.

> "Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said.
>
> "The victim later called a relative, who took her to Community Hospital and then called police. The suspect was identified by his children, according to police.
>
> "Rouch was arrested at his home by Emmett Township police, who were informed where he lived by Bedford Township investigators.
>
> "The charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office."

Defendant received the information printed in this story from the Bedford Township Police Department.[1]

The parties agree that the underlying facts behind the story are substantially false: plaintiff did not commit the rape. Although plaintiff was arrested for the crime,

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[1] **We note that defendant does not argue that it cannot be found liable (absent malice) simply because it was merely repeating what a police officer told its reporter. Defendant cannot escape liability merely because it repeated only what the police told it because a defendant is liable even if the libel is merely a repetition of what another person said. *Brewer* v *Chase*, 121 Mich 526; 80 NW 575 (1899); *Burt* v *McBain*, 29 Mich 260 (1874); 53 CJS, Libel and Slander, section 86, p 138. See also, *Gilman* v *McClatchy*, 111 Cal 606, 612; 44 P 241, 242 (1896):**

> **"If A. says B. is a thief, and C. publishes the statement that A. said B. was a thief, in a certain sense this would be the truth, but not in the sense that the law means. It would constitute no defense to C., for it would be a repetition by him of a slanderous charge. His defense must consist in showing that in fact B. was a thief." (Under modern law, he could also defend by showing that he had not acted negligently.)**

he was never charged.[2] Instead, he was released after the Calhoun County Prosecutor's office refused to issue an arrest warrant. A few months later, somebody else was officially charged with the crime. Defendant printed a retraction on December 3, 1980 — one day after plaintiff instituted this lawsuit.

Defendant asserted in the trial court, and now on appeal, that Michigan law extends to media defendants a qualified privilege to report newsworthy stories concerning private figure plaintiffs and, as such, that plaintiff here was obligated to prove actual malice to prevail. The trial court rejected the notion that Michigan law embodies a qualified privilege for newsworthy accounts, but held that Michigan does recognize a qualified privilege to report on matters of general public interest. The trial court agreed with defendant that, because the report of an arrest was of general public interest, defendant was entitled to a qualified privilege and, because plaintiff could not prove actual malice, granted defendant's motion for summary judgment.

In this appeal, we must address whether the trial court correctly determined that defendant enjoyed a qualified privilege in reporting that plaintiff had been arrested and charged with a sexual assault and the alleged circumstances of the assault, his identification,

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[2] **By itself, this particular inaccuracy is not libelous. If the gist, the sting, of the article is substantially true, the defendant is not liable. *McCracken* v *Evening News Ass'n*, 3 Mich App 32; 144 NW2d 694 (1966); *Gomba* v *McLaughlin*, 180 Colo 232; 504 P2d 337, 339 (1973). Whether or not the article is substantially true is a legal question. *Fendler* v *Phoenix Newspapers, Inc*, 130 Ariz 475; 636 P2d 1257 (1981); *Anderson* v *Stanco Sports Library, Inc*, 542 F2d 638 (CA 4, 1976). In this limited context, the sting is the fact of the arrest. To most of the reading public, the additional fact of being formally charged by the prosecutor adds little. The fact that he did not commit the rape and that none of the underlying facts of the story are true, however, defeats the defense that the article was substantially true.**

and his apprehension. Since defendant's brief implies that a qualified privilege to report such matters about a private figure plaintiff is constitutionally required, we turn to a consideration of the constitutional limitations on a state's power to define its own defamation laws.

As recently as 1957, the United States Supreme Court flatly concluded "that libelous utterances are not within the area of constitutionally protected speech." *Roth* v *United States*, 357 US 476, 483; 77 S Ct 1304; 2 L Ed 2d 1498 (1957). However, in the next decade, the constitutional revolution in defamation law wrought profound changes to the common law of nearly every state. In *New York Times Co* v *Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964), the Supreme Court held that the First Amendment prohibits a public official from recovering damages for defamation unless he can prove that the defamatory statements were made with "actual malice," which was defined as knowledge that the statement was false or reckless disregard of whether it was false.[3]

The *New York Times*' decision was subsequently extended by the United States Supreme Court in *Associated Press* v *Walker*, 388 US 180; 87 S Ct 1975; 18 L Ed 2d 1094 (1967), to include "public figures" within the group of defamation plaintiffs who were required to prove "actual malice" as this term is used in *New York Times*. Thereafter, in the plurality opinion of Justice Brennan in *Rosenbloom* v *Metromedia, Inc*, 403 US 29; 91 S Ct 1811; 29 L Ed 2d 296 (1971), three members of the Court said that if the communication involves matters of public or

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[3] **Reckless disregard of the truth was later equated with "false statements made with the high degree of awareness of their probable falsity". *Garrison* v *Louisiana*, 379 US 64, 78; 85 S Ct 209; 13 L Ed 2d 125 (1964). See also, *Curtis Publishing Co* v *Butts*, 388 US 130, 153; 87 S Ct 1975; 18 L Ed 2d 1094 (1967) and *St Amant* v *Thompson*, 390 US 727, 731; 88A S Ct 1323; 20 L Ed 2d 262 (1968).**

general concern, even a private figure plaintiff is required to prove *New York Times*' actual malice.

In *Gertz* v *Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 780 (1974), however, the Court rejected the views of Justice Brennan as expressed in *Rosenbloom*. Instead, the Court left it to the states to define the scope of their defamation laws where private figure plaintiffs are involved subject to only two constitutional limitations:[4] (1) that liability may not be imposed against media defendants without fault and (2) that punitive damages may not be imposed against media defendants unless *New York Times*' actual malice is

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4 "[W]e conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.

* * *

"[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.

* * *

"Our accomodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation." 418 US 323, 345-349; 94 S Ct 2997, 3010-3011; 411 L Ed 2d 780, 809-810.

proven.[5] Clearly, then, contrary to the apparent position of defendant, there is no federal constitutional privilege to report on matters of public interest.[6]

Defendant next argues that even if no federal constitutional privilege to report on matters of public interest exists, Michigan has nevertheless provided a common-law qualified privilege which would protect defendant from liability for negligence in printing its story. If a news story is qualifiedly privileged, the plaintiff must

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[5] Here, plaintiff, not a public figure, is requesting neither.

[6] Following *Gertz*, a few courts have adopted a standard in accord with the *Rosenbloom* plurality and have required a private figure plaintiff to prove *New York Times*' actual malice or something very close to it in order to prevail in actions against media defendants where the allegedly defamatory publication involves a matter of legitimate public concern or interest. See *Chapadeau* v *Utica Observer-Dispatch, Inc*, 38 NY2d 196; 341 NE2d 569 (1975), [gross irresponsibility]; *Walker* v *Colorado Springs Sun, Inc*, 188 Colo 86; 538 P2d 450, *cert den* 423 US 1025; 96 S Ct 649; 46 L Ed 2d 399 (1975); *Aafco Heating & Air Conditioning Co* v *Northwest Publications, Inc*, 162 Ind App 671; 321 NE2d 580 (1974), *cert den* 424 US 913; 96 S Ct 1112; 47 L Ed 2d 318 (1976). The vast majority of the states to consider this issue, however, have adopted a negligence standard for determining if a defendant is liable to a private figure plaintiff for a defamatory falsehood. See, *e.g.*, *Peagler* v *Phoenix Newspapers, Inc*, 114 Ariz 309; 60 P2d 1216 (1977); *Phillips* v *The Evening Star Newspaper*, 424 A2d 78 (DC App, 1980); *Cahill* v *Hawaiian Paradise Park Corp*, 56 Haw 522; 543 P2d 1356 (1975); *Troman* v *Wood*, 62 Ill 2d 184; 340 NE2d 292 (1975); *Gobin* v *Globe Publishing Co*, 216 Kan 223; 531 P2d 76 (1975); *McCall* v *Courier-Journal and Louisville Times Co*, 623 SW2d 882 (Ky, 1981), *cert den* 456 US 975; 102 S Ct 2239; 72 L Ed 2d 849 (1982); *Jacron Sales Co* v *Sindorf*, 276 Md 580; 350 A2d 688 (1976); *Stone* v *Essex County Newspapers, Inc*, 367 Mass 849; 330 NE2d 161 (1975); *Maloney & Sons, Inc* v *E W Scripps Co*, 43 Ohio App 2d 105; 334 NE2d 494 (1974), *cert den* 423 US 883; 96 S Ct 151; 46 L Ed 2d 111 (1975); *Martin* v *Griffin Television, Inc*, 549 P2d 85 (Okl, 1976); *Memphis Publishing Co* v *Nichols*, 569 P2d 85 (Tenn, 1978); *Foster* v *Laredo Newspapers, Inc*, 541 SW2d 809 (Tex, 1976), *cert den* 429 US 1123; 97 S Ct 1160; 51 L Ed 2d 573 (1977); *Seegmiller* v *KSL, Inc*, 626 P2d 968 (Utah, 1981); *Taskett* v *King Broadcasting Co*, 86 Wash 2d 439; 546 P2d 81 (1976); *Denny* v *Mertz*, 106 Wis 2d 636; 318 NW2d 141 (1982), *cert den* ___ US ___; 103 S Ct 179; 74 L Ed 2d 147 (1982).

show malice to recover for libel. *Edwards* v *Chandler*, 14 Mich 471; 90 A Dec 249 (1866); *Tumbarella* v *The Kroger Co*, 85 Mich App 482; 271 NW2d 284 (1978), *lv den* 406 Mich 939 (1979). Whether or not a qualified privilege exists is a legal question. *Cochrane* v *Wittbold*, 359 Mich 402, 407; 102 NW2d 459 (1960); *Tocco* v *Piersante*, 69 Mich App 616; 245 NW2d 356 (1976), *lv den* 399 Mich 882 (1977). A qualifiedly privileged story is not actionable if honestly believed to be true and published in good faith. *Lawrence* v *Fox*, 357 Mich 134, 142; 97 NW2d 719 (1959). This privilege is not limited to public individuals. *Peisner* v *Detroit Free Press, Inc*, 82 Mich App 153; 266 NW2d 693 (1978).

In this case, defendant argues that its story is protected by two separate qualified privileges. The first is the qualified privilege for accurately and fairly reporting judicial proceedings as provided by MCL 600.2911(3); MSA 27A.2911(3). The second is the privilege in Michigan to report matters in the public interest, as set forth in *Lawrence* v *Fox*, *supra*. We will address each argument in turn.

MCL 600.2911(3); MSA 27A.2911(3) states:

> "No damages shall be awarded in any libel action brought against a reporter, editor, publisher, or proprietor of a newspaper for the publication in it of a fair and true report of any public and official proceeding, or for any heading of the report, which is a fair and true headnote of the article published. This privilege shall not apply to a libel which is contained in any matter added by any person concerned in the publication or contained in the report of anything said or done at the time and place of public and official proceeding which was not a part of the public and official proceeding."

We do not agree with defendant that this privilege applies in the present case. Because "a warrant [was] never issued, there [were] no official proceedings that [could have been] reported and this statute is not applicable". *McCracken* v *Evening News Ass'n*, 3 Mich App 32, 39; 144 NW2d 694 (1966).[7] Although the privilege to accurately and fairly report judicial proceedings does permit a newspaper to report that a particular individual has been arrested for a particular crime, *Piracci* v *The Hearst Corp*, 263 F Supp 511 (D Md, 1966), as long as the matter has not advanced beyond the arrest, the privilege does not cover reporting the particular details of the alleged crime. As stated in 3 Restatement Torts, 2d, section 611:

> "Report of Official Proceeding or Public Meeting. The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate or a fair abridgement of the occurrence reported."

Comment h to this section provides:

> "An arrest by an officer is an official action, and a report of the fact of the arrest or of the

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[7] In a similar vein, publishing a charge found in a bill of complaint is not privileged. *Park* v *The Detroit Free Press Co*, 72 Mich 560; 40 NW 734 (1888); *Nixon* v *Warner Communications, Inc*, 435 US 589, 598; 98 S Ct 1306, 1312; 55 L Ed 2d 570, 580 (1978).

Likewise, the federal constitutional privilege to fairly and accurately report judicial proceedings has never been extended to cover proceedings before a warrant has even been sworn out. *Cox Broadcasting Corp* v *Cohn*, 420 US 469; 95 S Ct 1029; 43 L Ed 2d 328 (1975), and *Nebraska Press Ass'n* v *Stuart*, 427 US 539; 96 S Ct 2791; 49 L Ed 2d 683 (1976), both cited by defendant, are distinguishable. *Cox Broadcasting*, a right to privacy case rather than a defamation case, involved the newspaper's right to reveal a rape victim's name obtained from public documents. *Nebraska Press* involved a newspaper's right to cover a criminal trial.

> charge of crime made by the officer in making or returning the arrest is therefore within the privilege covered by this Section. On the other hand statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case where the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section."[8]

Therefore, if defendant is to be protected from its own negligence in its reporting of the details of the alleged offense, the protection must be provided by the second, common-law, privilege asserted by defendant — the qualified privilege to report matters in the public interest. Defendant claims that stories about crime are necessarily matters of public interest, and argues that the specific details of the alleged crime fit within this description and thus reporting the details is qualifiedly privileged.

To a certain extent, criminal matters are within the public interest. In *Miner* v *The Detroit Post & Tribune Co*, 49 Mich 358, 364; 13 NW 773 (1882), the Supreme Court held that the defendant had a privilege to bring to

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[8] **See also, Prosser, Torts (4th ed), section 21, pp 831-832:**

> **"Thus it is the prevailing view, with some few courts to the contrary, that a pleading or a deposition filed in a case but not yet acted upon may not be reported under the claim of privilege. * * * The same is of course true of the preliminary statements of police, or any other evidence not yet given." (Footnotes omitted.)**

And 1 Harper and James, The Law of Torts, section 5.24, p 433:

> **"[T]he publication of a petition, and answer, a deposition or an affidavit before a hearing has been held, does not receive the protection of a privilege. The same is true, as a general rule, of investigations and other activities of the police before a warrant is issued or any other official action taken."**

public light a judicial officer's order which jailed a person even though no charge had first been filed against him and no bail had been required to be set: "Few duties can be plainer than to challenge public attention to the official disregard of the principles which protect public and personal liberty." Likewise, in *Stice* v *Beacon Newspaper Corp, Inc*, 185 Kan 61; 340 P2d 396; 76 ALR 2d 687 (1959), the Supreme Court of Kansas held that a current news story involving a continuing violation of the law, like a police burglarly ring, is also qualifiedly privileged.

Relying on *Schultz* v *Newsweek, Inc*, 668 F2d 911, 918 (CA 6, 1981), which construed Michigan law, defendant argues that the courts in Michigan require nonpublic figure plaintiffs to prove that media defendants who have published a defamatory news story of general public interest acted with actual malice: "The privilege attaches to reports on matters of general public interest even though the plaintiff is a private individual." In our opinion, *Schultz* is distinguishable. The sole state court decision of any precedential value cited by the *Schultz* Court as support for the proposition that media defendants in Michigan enjoy a qualified privilege to report on matters of general public interest is *Peisner* v *Detroit Free Press, Inc*, *supra*. In *Peisner*, this Court quoted extensively from *Lawrence* v *Fox*, *supra*, as to the nature of the Michigan qualified privilege to report on matters in the public interest. There, the Supreme Court explicitly relied upon 3 Restatement Torts, section 619, comment (a), in holding that whether or not a qualified privilege exists is a question of law to be resolved under the rules set forth in sections 585-599 of the Restatement. 357 Mich 134, 140-141. 3 Restatement Torts, section 598[9] provides:

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[9] **3 Restatement Torts, 2d, section 598, is identical to the wording appearing in the original Restatement.**

"Communication to One Who May Act in the Public Interest.

"An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

"(a) there is information that affects a sufficiently important public interest, and

"(b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true."

Comment (b) to this section provides in pertinent part:

"The rule stated in this Section is applicable when any recognized interest of the public is in danger, including the interest in the prevention of crime and the apprehension of criminals, the interest in the honest discharge of their duties by public officers, and the interest in obtaining legislative relief from socially recognized evils."

As the Restatement implies, there is an important distinction between matters which truly promote the

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[10] In *Gaynes* v *Allen*, 128 Mich App 42; 339 NW2d 678 (1983), the defendants had published a newsletter informing its members and the public about the quality of health care. One particular article accused the plaintiff of professional negligence. In ruling that the defendants are entitled to a qualified privilege to write its story, this Court stated:

> "Ophthalmologists and the general public have a vital interest in the proper delivery of eye care services and in being informed of the level of competence of health care deliverers. *The issue* to which the allegedly defamatory article addressed itself *is one deserving of robust public debate.* We hold the published information was a matter of legitimate public concern and that defendants had a qualified privilege to publish it." 128 Mich App 48-49. (Emphasis supplied.)

public interest and matters which are merely interesting to the public. Under the Restatement formulation, media defendants enjoy a qualified privilege to report on matters which advance an important societal or public interest,[10] not a qualified privilege to report on every matter which may be of interest to the public. See also, *Timmis* v *Bennett*, 352 Mich 355, 368-369; 97 NW2d 719 (1958); *Postill* v *Booth Newspapers, Inc*, 118 Mich App 608, 619; 325 NW2d 511 (1982), *lv den* 417 Mich 1050 (1983); *Walker* v *Cahalan*, 97 Mich App 346, 356; 296 NW2d 18 (1980), *rev'd on other grounds* 411 Mich 857; 306 NW2d 99 (1981), *cert den* 454 US 1032; 102 S Ct 570; 70 LE2d 476 (1981). A privilege extends only so far as the reason for it applies. *Timmis*, *supra*. Hence, "[t]he public needs to know what goes on in court but does not need to know that A has slandered or libeled B outside of court". *Lubore* v *Pittsburgh Courier Publishing Co, Inc*, 91 App DC 311; 200 F2d 355 (1952). See also, *Clark* v *American Broadcasting Companies, Inc*, 694 F2d 1208 (CA 6, 1982), *cert den* ___ US ___; 103 S Ct 1433; 75 L Ed 2d 792 (1983). In other words, a matter is not necessarily privileged merely because it in some way relates to the public interest. *Rancho La Costa, Inc* v *Superior Court of Los Angeles County*, 106 Cal App 3d 646, 666; 165 Cal Rptr 347, 360 (1980), *app dis* 450 US 902; 101 S Ct 1336; 67 L Ed 2d 326 (1981).

Both *Fox* and *Peisner* involved published reports concerning a threat to a recognized societal or public interest. In *Fox*, the media defendants had reported that plaintiff, a deputy superintendent of police in Detroit, had engaged in fraud, corruption, protection of criminals, perjury and deceit. Indeed, "few offenses known to the litany of prostitution of public trust were omitted". *Fox*, *supra*, 135. Clearly, under the Restatement view, the defendants in *Fox* were entitled to claim a qualified privilege since the matters reported concerned the public

interests in the prevention of crime, apprehension of criminals, and the honest discharge by high-ranking police officials of their duties. In *Peisner*, the newspaper defendant ran an article which accused the plaintiff of failing to raise the issue of judicial misconduct on appeal of an indigent defendant's criminal conviction because the plaintiff was the judge's longtime friend' and former campaign manager. Thereafter, upon plaintiff's written request for a retraction, the defendant ran an editorial deploring the "buddy system" of judicial appointments. Again, under the Restatement approach, the newspaper defendant enjoyed a qualified privilege to report on a matter which, if true, clearly threatened the recognized societal interest in ensuring equal justice of the law to all criminal defendants. 82 Mich App 153, 163. See also, *Hayes* v *Booth Newspapers, Inc*, 97 Mich App 758, 774; 295 NW2d 858 (1980), and *Postill, supra*, 619.

Contrary to defendant's assertion, *Schultz* did not rule that a story is qualifiedly privileged merely because it covers a subject found to be generally interesting. In *Schultz*, the defendant published a series of articles dealing with the disappearance of Jimmy Hoffa. Specifically, the news articles called the plaintiff an underworld figure who was a key figure in causing the disappearance of Jimmy Hoffa. The plaintiff conceded that the subject of Hoffa's disappearance was a matter of public interest as covered by the qualified privilege provided in Michigan. He then argued, however, that the defendant was not protected by this privilege as to him because he was merely an "incidental" or "peripheral" figure in the investigation and that the scope of the privilege was a jury question. The *Schultz* Court disagreed and found "no support for the * * * contention that the 'scope' of the privilege in cases involving matters of general public interest is a question of fact". 668 F2d 911, 918.

Clearly, stories about organized crime and the disappearance of Jimmy Hoffa deal with matters the discussion of which advances public concerns. After all, Hoffa was a major public figure and his disappearance led to an intense police investigation. On the other hand, the present case, involves a nonpublic-figure plaintiff who had already been "apprehended". Reporting to the public what he had allegedly done advanced no public concern.

Although information given to police officers regarding criminal activity is absolutely privileged, *Shinglemeyer* v *Wright*, 124 Mich 230; 82 NW 887 (1900), newspaper accounts of these accusations are not even qualifiedly privileged. *Jastrzembski* v *Marxhausen*, 120 Mich 677; 79 NW 935 (1899); *Sciansi* v *New Times Publishing Co*, 639 F2d 54 (CA 2, 1980); *Fullerton* v *Berthiaume*, 6 Que CS 342, 343 (1894). Furthermore, in both *Sherwood* v *Evening News Ass'n*, 256 Mich 318; 239 NW 305 (1931),[11] and *Davis* v *Marxhausen*, 86 Mich 282; 49 NW 50 (1891), the Supreme Court held that the defendants were not privileged to report information received from the police that the plaintiffs had been involved in criminal activity. The defendants had incorrectly reported that the plaintiffs had been arrested.

One of the cases relied upon in *Lawrence* v *Fox*, *supra*, is *McAllister* v *The Detroit Free Press Co*, 76 Mich 338; 43

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[11] **Defendant contends that *Sherwood* is a "classic expression of the doctrine of liability without fault" and, as such, is "no longer valid law". Assuming, *arguendo*, that defendant has correctly characterized *Sherwood* in this regard, the fact that *Gertz*, *supra*, no longer allows the states to impose liability on media defendants without fault hardly means that every holding in *Sherwood* is no longer valid. No Michigan Supreme Court precedents have subsequently held that media defendants enjoy a qualified privilege to report on matters uncovered from police gossip or in conversation with the police. Just as the discovery of one rotten apple in a bushel is no reason to throw out the bushel, one overruled proposition in a case is no reason to ignore all the other holdings appearing in that decision.**

NW 431 (1889), which has strikingly similar circumstances to the instant case. There, plaintiff had been arrested in Windsor, Ontario. Sometime earlier, a post office in Bothwell, Ontario had been robbed. Although the plaintiff was in fact arrested (and later released) for violating a Canadian postage stamp law, the article, based on information from the police, tied plaintiff to the post office robbery. The Supreme Court held that no qualified privilege applied:

> "It is argued that a newspaper in this day and age of the world, when people are hungry for the news, and almost every person is a newspaper reader, must be allowed some latitude and more privilege than is ordinarily given under the law of libel as it has heretofore been understood. In other words, because the world is thirsting for criminal items, and the libel in a newspaper is more far-reaching and wide-spread than it used to be when tales were only spread by the mouth, or through the medium of books or letters, there should be given greater immunity to gossip in the newspaper, although the harm to the person injured is infinitely greater than it would be if published otherwise.
>
> "The greater the circulation the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items. No newspaper has any right to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and fame or business. And the reporter of a newspaper has no more right to collect the stories on the street, *or even to gather information from policemen or magistrates out of court*, about a citizen, and to his detriment, and publish such

stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street. If true, such publication or such speaking may be privileged, but if false, the newspaper as well as the citizen must be responsible to any one who is wronged and damaged thereby.

"It is indignity enough for an honest man to be arrested and put in prison for an offense of which he is innocent, and for which indignity oftimes he has no redress, without being further subjected to the wrong and outrage of a false publication of the circumstance of such arrest and imprisonment, looking towards his guilt, without remedy. And no sophistry of reasoning, and no excuse of the demand of the public for news, or of the peculiarity and magnitude of newspaper work, can avail to alter the law, except, perhaps, by positive statute, which is doubtful, so as to leave a party thus injured without any recompense for a wrong which can even now, as the law stands, never be adequately compensated to one who loves his reputation better than money." 76 Mich 338, 355-356. (Emphasis supplied.)

Although no recent Michigan decision has addressed the issue of whether media defendants have a qualified privilege to report the details of a crime before the case has advanced to a judicial proceeding, recent decisions from other jurisdictions support the rule of *McAllister* and *Sherwood*. In *Phillips* v *The Evening Star Newspaper Co*, 424 A2d 78 (DC App, 1980), the defendant reported that plaintiff had been arrested after shooting and killing his wife during a quarrel. The defendant had

obtained this information from a "hot line" maintained by the public information office of the District of Columbia ("D.C.") Police Department. Whenever an event occurred which the public information officer of the D.C. Police Department deemed newsworthy, he prepared a written report and transmitted orally the information over the "hot line phone". In fact, in Phillips, plaintiff had been arrested for homicide, but the killing was later reclassified as an accidental shooting. There was no proven basis for the "hot line" report that the shot had been fired "during an argument". The *Phillips* Court rejected the contention made by the defendant therein that the newspaper enjoyed a qualified privilege to report information gathered from the police "hot line".

In *Hornby* v *Hunter*, 385 SW2d473 (Tex Civ App, 1964), a deputy sheriff had told the defendant reporter that a warrant had been issued for the arrest of plaintiff for stealing a car. In fact, no warrant for stealing a car had ever been issued, although one had been issued against plaintiff for receiving and concealing stolen property. The Texas court held that even though the publication had been made in good faith, the defendant was liable for actual damages. In so ruling, the court specifically mentioned the conflict between the two competing interests herein involved:

> "[O]ne, the interest of an individual and his right to remain undamaged in his reputation in the community as a result of any libelous statements with reference to him, and the other fundamental principle involved with the other competing interests, the right of a free press to carry on its business in an ordinary fashion in a businesslike way and to disseminate the news and to publish and circulate that news without

> fear or restraint so far as reporting accurately, fearlessly and completely." 385 SW2d 473, 477.

The Texas court resolved this particular conflict by ruling that "a false statement of fact, concerning an individual even if made as a result of a communication from a public official is not privileged as a fair comment upon matters of public concern". *Id.*

Likewise, in *Lancour* v *Herald & Globe Ass'n*, 111 Vt 371; 17 A2d 253; 132 ALR 486 (1941), the Supreme Court of Vermont struck the same balance. There, the newspaper article not only merely reprinted what the police officers had told the defendant, but it stated that these matters were "alleged by authorities". However, merely printing "it is alleged" did not absolve the defendant of liability: "'An accusation purporting to rest on hearsay is nonetheless defamatory.'" 111 Vt 371, 380; 17 A2d 253, 257. After noting the conflict also mentioned in *Hornby*, *supra*, the *Lancour* court reached the same result:

> "But weighing the social values involved, it seems better to confide in the diligence and discretion of such officials, rather than that any person should be subjected to unmerited obloquy through the publication of false accusations made to them in the course of their investigations, the tendency of which is, in the words of Ellenborough, C.J., in *Rex* v. *Fisher*, 2 Camp. 563, 571, 'to prejudice those whom the law still presumes to be innocent and to poison the sources of justice.'" 111 Vt 371, 385-386; 17 A2d 253, 259.

See also, *Williams* v *WCAU-TV*, 555 F Supp 198 (ED Pa, 1983); *Lambert* v *Providence Journal Co*, 508 F2d 656 (CA 1, 1975), *cert den* 423 US 828; 96 S Ct 45; 46 L Ed 2d 45 (1975); *O'Neal* v *The Tribune Co*, 176 So 2d 535 (Fla App, 1965); *Christy* v *Stauffer Publications, Inc*, 437 SW2d 814

(Tex, 1969); *Commercial Publishing Co* v *Smith*, 149 F 704 (CA 6, 1907). Contra, *Brown* v *Johnson Newspapers Corp*, 84 App Div 2d 636; 444 NYS2d 493 (1981); *Turnbull* v *Herald Co*, 459 SW2d 516 (Mo App, 1970); *Kilgore* v *Koen*, 133 Ore 1; 288 P 192 (1930); *McClure* v *Review Publishing Co*, 38 Wash 160; 80 P 303 (1905).

We conclude that, in Michigan, where, as here, the media defendants' publication is not wrapped in a qualified privilege, a private-figure plaintiff need only prove negligence in order to prevail.

In the present case, the details of plaintiff's alleged crime were merely matters that the public would find generally interesting and not matters "deserving of robust public debate". The fact that defendant had been arrested for raping his ex-wife's teen-age baby sitter and cutting off the baby sitter's clothes with a knife does not contribute to the public's interest in reducing or detecting crime. Instead, it merely maximizes the damage to plaintiff's reputation. Thus, considering the obvious harm to plaintiff's reputation, we conclude that the balance should be struck in plaintiff's favor.

This holding does not preclude a newspaper from ever printing the facts of an alleged crime by a non-public-figure plaintiff. A newspaper may avoid liability for negligence in printing such details by either reporting the fact of an individual's arrest, without mentioning the details of the crime (and thus be protected by the official proceedings privilege), see, *e.g.*, 3 Restatement Torts, 2d, sec 611, comment h, p 301, or by reporting the details of the alleged crime without naming the suspect until the matter has advanced to official proceedings (and so avoiding the possibility that the article is even libelous).

Unfortunately, in this case, defendant chose to print the details of the crime and specifically named plaintiff

as the suspect. Naturally, this approach maximized the potential of harm to plaintiff's reputation. We believe that the individual's right to be compensated for such an injury outweighs the relatively slight impingement (as in this case) on a newspaper's right to report such matters: "The public interest does not require that the right to enjoy a good name shall be made subservient to the right of free speech." *Lancour, supra*, 111 Vt 371, 386; 17 A2d 253, 259.

Therefore, we hold that the trial judge erred by ruling that plaintiff must show that defendant possessed malice when it printed its article. Instead, plaintiff need only show that defendant was negligent in printing the defamatory matter in order for plaintiff to recover his actual damages. 3 Restatement Torts, 2d, section 580B(c).

Reversed and remanded for proceedings consistent with this opinion. Plaintiff may tax costs.

/s/ Richard M. Maher
/s/ Roman S. Gribbs
/s/ Kenneth N. Sanborn

OPINION

(State of Michigan — Supreme Court)

(Filed December 26, 1986)

(DAVID J. ROUCH, Plaintiff-Appellee, v ENQUIRER & NEWS OF BATTLE CREEK, Michigan, A Delaware Corporation, Defendant-Appellant — No. 75044)

G. Mennen Williams, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dorothy Comstock Riley, Dennis W. Archer, Associate Justices.

BEFORE THE ENTIRE BENCH

BRICKLEY, J.

In this case, arising out of an alleged false newspaper defamation of a private individual who was arrested but not formally charged for rape, it is necessary to determine the applicability of Michigan's statutory "public and official proceedings" statute, MCL 600.2911 (3); MSA 27A.2911 (3), and the viability of its common-law qualified public-interest privilege. Because this case was decided on the basis of summary judgment, only these privilege questions are before us.

I.

INTRODUCTION

The facts in this case are undisputed. On December 21, 1979, the Emmett Township police arrested the plaintiff, David J. Rouch, in connection with the rape of a woman in Bedford Township. At the time of the rape, the victim had been babysitting Mr. Rouch's step-children at his ex-wife's home. A standard incident report prepared by the Bedford Township Police Department indicated the name of the complaining party and victim,

that Mr. Rouch was a suspect, that the "charge" was "CSC in the 1st degree," that the injury involved "penis/vaginal penitration [sic]," and that a "knife with approx. 6 inch blade" was used as a weapon. Although he was arrested, plaintiff in fact was never formally charged with the crime, and ultimately, someone else was. The Calhoun County Prosecutor's Office had apparently refused to issue a warrant after plaintiff's arrest.

On December 22, 1979, the defendant newspaper published the following article:

> "Police arrest suspect in baby-sitter assault.
>
> "A 43-year-old man has been arrested and charged with the sexual assault of a 17-year-old-women [sic] who was baby-sitting with his children at his ex-wife's house on North Finlay Avenue in Bedford Township.
>
> "The suspect has been identified by Bedford Township police as David J. Rouch of 631 Golden Ave. He is free on a $10,000 personal recognizance interim bond pending his arraignment in District 10 Court next week. Rouch is charged with first-degree criminal sexual conduct.
>
> "Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said.
>
> "The victim later called a relative, who took her to Community Hospital and then called police. The suspect was identified by his children, according to police.
>
> "Rouch was arrested at his home by Emmett Township police, who were informed where he lived by Bedford Township investigators.

> "The charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office."

The defendant's reporter had received the information contained in the article from the Bedford Township Police Department.

The reporter's affidavit indicated that he customarily telephoned the police department in the morning to receive information about newsworthy police activities during the preceding twenty-four hours. He indicated that, on the occasion in question, he had spoken with one or two officers and that he was informed of the details that were contained in the article. The reporter also said that he spoke with the Emmett Township police who confirmed that the arrest had been made. A year later, plaintiff commenced this action for libel.

The plaintiff's complaint alleged that the article was false and defamatory. In its motion for summary judgment, defendant argued that the article was entitled to a qualified privilege under Michigan law, and that, in the absence of proof of malice, it could not be the basis of an action for libel. The trial court agreed. On June 14, 1982, Calhoun Circuit Judge Stanley Everett granted the defendant's motion for summary judgment of no cause of action. The order indicated that unless the plaintiff, within thirty days, established a genuine issue of material fact on the question of malice on the part of the defendant, the order would stand.

The trial court relied on *Schultz* v *Newsweek, Inc*, 668 F2d 911 (CA 6, 1982), a federal case interpreting Michigan law, as support for its finding of a qualified privilege. The court indicated that the privilege covers "matters of general public interest" and that the "reporting of arrests on criminal proceedings involving charges is a matter of general public interest."

The Court of Appeals reversed. *Rouch* v *Enquirer & News of Battle Creek*, 137 Mich App 39; 357 NW2d 794 (1984). Approaching the issue of privilege first from a constitutional perspective, the Court outlined the history of United States Supreme Court cases on the subject and concluded that

> "there is no federal constitutional privilege to report on matters of public interest." *Rouch, supra*, p 46.

The Court observed that the majority of states that have ruled on the issue have adopted a negligence standard for determining whether a defendant is liable to a private-figure plaintiff for a defamatory falsehood. See *id.*, p 46, n 6.

Regarding the statutory qualified privilege contained in MCL 600.2911(3); MSA 27A.2911(3), the Court held that because no warrant was issued in this case, there were no "official proceedings" and the statute was inapplicable. Referring to the general privilege to report judicial proceedings, the Court found that that privilege is limited to the fact of the arrest only, and not the "particular details of the alleged crime." *Id.*, p 48 (citing 3 Restatement Torts, 2d, § 611, comment [h]).

Finally, the Court considered the application of a common-law privilege to report matters in the public interest. It assumed the existence of such a privilege in Michigan, but found that the details contained in the instant article did not fall within the privilege. The Court reasoned,

> "[T]here is an important distinction between matters which truly promote the public interest and matters which are merely interesting to the public." *Id.*, p 51 (citing 3 Restatement Torts, 2d, § 598, comment [b]).

The Court of Appeals concluded,

> "[I]n Michigan, where, as here, the media defendants' publication is not wrapped in a qualified privilege, a private-figure plaintiff need only prove negligence in order to prevail.
>
> "In the present case, the details of plaintiff's alleged crime were merely matters that the public would find generally interesting and not matters 'deserving of robust public debate.' The fact that plaintiff had been arrested for raping his ex-wife's teenage baby sitter and cutting off the baby sitter's clothes with a knife does not contribute to the public's interest in reducing or detecting crime. Instead, it merely maximizes the damage to plaintiff's reputation. Thus, considering the obvious harm to plaintiff's reputation, we conclude that the balance should be struck in plaintiff's favor." *Id.*, pp 58-59.

Thus, the Court held

> "that the trial judge erred by ruling that plaintiff must show that defendant possessed malice when it printed its article. Instead, plaintiff need only show that defendant was negligent in printing the defamatory matter in order for plaintiff to recover his actual damages." *Id.*

Defendant appealed to this Court, and leave was granted on June 26, 1985. 422 Mich 934 (1985).

II.

THE STATUTORY OFFICIAL PROCEEDINGS PRIVILEGE

Because, if it is applicable, it would determine the outcome of this case, we first discuss the "official proceedings privilege" statute, MCL 600.2911 (3); MSA 27A.2911 (3). The relevant provisions of that statute read:

> "No damages shall be awarded in any libel action brought against a reporter, editor, publisher, or proprietor of a newspaper for the publication in it of a fair and true report of any public official proceeding . . . ."

Although the statute was enacted in 1931, its origins may be traced to much earlier Michigan common law. In 1882, this Court summarized the various common-law privileges available at the time. We described what may be termed a privilege to report judicial proceedings:[1]

> "[T]he publication of judicial proceedings taken before magistrates is privileged to the same extent as the proceedings of the trial court . . . ." *Miner* v *Detroit Post & Tribune*, 49 Mich 358, 359; 13 NW 773 (1882).

The privilege was invoked in *Jastrzembski* v *Marxhausen*, 120 Mich 677; 79 NW 935 (1899), which involved an article concerning the plaintiff's alleged elopement with a woman other this his wife. The newspaper claimed the privilege because the story was based on a verbal complaint made by the plaintiff's wife to a police officer. We noted that "[t]he only document filed in the justice's court was a complaint made for nonsupport, and this was not known to the reporters or to defendant." *Id.*, p 680. Thus, we held that the privilege did not apply in that "[t]he statements published were not gathered from any proceedings in court, but the information was obtained from parties entirely outside of any court." *Id.*, p 682.

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[1] **This privilege is qualified, and should be distinguished from the absolute privilege that covers what is said during the course of judicial proceedings. The latter provilege is obviously not claimed in this case, nor is it applicable.**

The common-law privilege to report judicial proceedings was again claimed in *Sherwood* v *Evening News Ass'n*, 256 Mich 318; 239 NW 305 (1931), but was held not to cover the facts of that case. In *Sherwood*, we noted,

> "It is well settled that a faithful and fair report of the proceedings in courts of justice are privileged, even though the reputation of individuals incidentally suffer [sic] from their publication . . . ." *Id.*, p 320.

In *Sherwood*, defendant's article had alleged that the plaintiff had participated in a gun fight with the police, had been wounded, had stolen a car to escape, and had been caught and put in jail. In the words of the Court,

> "Plaintiff was not the bandit, did not participate in the gun battle, was not shot, did not steal a car, was not arrested, or sent to jail." *Id.*, p 319.

The issue was whether the defendant, absent malice, was "privileged in publishing a true, a fair, and accurate statement of information received from the sheriff and his deputies concerning the official acts of such public officers?" *Id.* Relying on applications of similar qualified privileges from other states, and on *Davis* v *Marxhausen*, 86 Mich 281; 29 NW 50 (1891), after remand 103 Mich 315; 61 NW 504 (1894), *Clair* v *Battle Creek Journal Co*, 168 Mich 467; 134 NW 443 (1912), and *Jastrzembski*, *supra*, we held that the jury instructions were "more favorable than defendant was entitled to." *Id.*, p 325. The instructions had stated:

> "When a newspaper fairly and without malice or intent to harm, publishes the progress being made in a criminal matter upon the information received from peace officers in charge of the examination involving crime, the articles so pub-

> lished are qualifiedly privileged, and the newspaper would not be liable in damages." *Id.*

The statute of course, is not limited to judicial proceedings, but refers to "any public and official proceeding." Only one Michigan case has actually construed this language.

In *McCracken* v *Evening News Ass'n*, 3 Mich App 32; 141 NW2d 694 (1966), the Court of Appeals applied the statutory privilege in a case that is factually similar to the case at bar. It referred to the statutory privilege as a qualified one.

In *McCracken*, the plaintiff was a subcontractor on a building addition to a VA hospital. An employee of the general contractor on the project had signed a complaint against the plaintiff, alleging felonious execution and delivery of an allegedly false certificate that certain materials were in plaintiff's possession. A warrant was issued and the defendant published an article about the affair, quoting the warrant and comments made by the assistant prosecutor.

The Court found the privilege applicable. It held that the slight inaccuracy in the article did not amount to an abuse of the statutory privilege and ruled in favor of the defendant.

However, the Court made the following observations:

> "The statute protects newspaper publishers if the article is a fair and true report of the public and official proceeding. The fact that the reporter herein relied on the word of another as to the nature of the complaint and warrant is immaterial. The statute does not command the reporter to obtain his information from the official court records. At his risk, and at the risk of his publisher, he may rely upon the word of

> another as to the contents of the complaint and warrant, and that it will be so issued if it has not already been. If the information thus obtained and published does not substantially represent the matter contained in the court records, then the question arises as to whether or not the publisher has abused his privilege. The abuse of the privilege is a question of fact for the trier of fact to determine. *Obviously, if a warrant is never issued, there are no official proceedings that can be reported and this statute is not applicable." Id.*, pp 38-39 (emphasis added).

The Court of Appeals in *Rouch* found the arrest privileged under the statute, but the supporting information from the police officers outside the privilege. We agree that the statute does not apply, but under a different analysis.

It has not been made known to us whether, in adopting this statute in 1931, the Legislature wished to codify the common-law privilege to report judicial proceedings,[2] and intended that the word "proceedings" refer only to judicial proceedings, or whether a broader scope was intended.

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[2] Justice Boyle would apply a much broader common-law privilege to this case to cover the reporting of official actions. See Slip Op., p 11, n 15. Such a general reporting privilege may have been adopted by other states, but has never been recognized in Michigan. In addition, there is no indication, either from the words of the statute or the legislative history, that our Legislature intended to enact a broad reporting privilege.

Even if the common-law privilege that existed prior to the enactment of MCL 600.2911 (3); MSA 27A.2911 (3) may be characterized as a privilege to report on official or public proceedings, that assumption does not alter our basic conclusion that an arrest without a warrant does not amount to an official or public proceeding.

In support of its finding that the arrest was privileged, but that the supporting information was not, the Court of Appeals quoted three sources. See *Rouch*, *supra*, pp 48-49. The Restatement of Torts, states:

> "The publication of defamatory matter concerning another in a report of an *official action* or proceedings or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." 3 Restatement Torts, 2d, § 611 (emphasis added).

The Court quoted comment (h) to that section:

> "The arrest by an officer is an *official action*, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section. On the other hand statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section." (Emphasis added.)

It also cited Prosser, Torts (4th ed), § 118, pp 831-832:

> "Thus it is the prevailing view, with some few courts to the contrary, that a pleading or a deposition filed in a case but not yet acted upon may not be reported under the claim of privilege . . . .
>
> "The same is of course true of the preliminary statements of police, or any other evidence not yet given."

The Court also relied upon 1 Harper & James, Torts, § 5.24, p 433:

> "[T]he publication of a petition, and answer, a deposition or an affidavit before a hearing has been held, does not receive the protection of privilege. The same is true, as a general rule, of investigations and other activities of the police before a warrant is issued or any other official action taken." *Id.*, pp 48-49, n 8.

We cannot agree with the Court of Appeals use of these authorities.[3] The Restatement deals with a privilege ("official *action*") broaker than either our common-law privilege to report judicial proceedings or the statutory "public and official proceedings" privilege. Accordingly, it is not helpful in our effort to interpret the statute.[4] The quotations from Prosser and Harper & James do relate to judicial-proceedings privileges, but do not support the inclusion of either the arrest or the supporting "charge" under such a privilege.

Although we have not spoken on the question whether an arrest is a "judicial proceeding," others

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[3] Justice Boyle also relies on these authorities, but cites no Michigan case indicating that this state has adopted their version of this privilege.

[4] Because we find the privilege described in § 611 of the Restatement to be broader than contained in MCL 600.2911 (3); MSA 27A.2911 (3), we likewise do not find comment (d) to that section helpful in construing the statute. Commend (d) notes:

> "The filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege." 3 Restatement Torts, 2d, § 611 (comment [d]).

If our statutory privilege covered "official action," then this comment might be used to include the standard-incident report filed in this case within the meaning of official action, and thereby render privileged defendant's report of that action. Such is not the case, however.

have, and generally, they have not found it to be the case. See, e.g., *Lancour* v *Herald & Globe Ass'n*, 111 Vt 371, 384-386; 17 A2d 253 (1941); *Turnbull* v *Herald Co*, 459 SW2d 516, 520 (Mo App, 1970).

A few cases have construed the meaning of "official," as opposed to "judicial," proceeding as it relates to a privilege governing the reporting of the same. The rationale for a "public proceedings" privilege is basically the same as that offered in favor of the judicial-proceedings privilege.

> "The privilege rests upon the idea that any member of the public, if he were present, might see and hear for himself, so that the reporter is merely a substitute for the public eye — this, together with the obvious public interest in having public affairs made known to all." Prosser & Keeton, Torts (5th ed), § 115, p 836.

In *Phillips* v *Evening Star Newspaper Co*, 424 A2d 78 (DC App, 1980), cert den 451 US 989 (1981), the District of Columbia Court of Appeals, applying the privilege to report official actions or proceedings as enunciated in § 611 of the Restatement, held that it did not apply to information obtained from a police "hot line." The court noted that

> "[t]his log representing the oral police communication from which the [newspaper] composed its article does not carry the dignity and authoritative weight as a record for which the common law sought to provide the reporting privilege." *Id.*, p 89.

Broader privileges have included arrests and information given to a law enforcement official. See *Lotrich* v *Life Printing & Publishing Co*, 117 Ill App 2d 89; 253 NE2d 899 (1969) (an official government proceedings and

records privilege applies to police files). See also *Lulay* v *Peoria Journal-Star, Inc*, 34 Ill 2d 112; 214 NE2d 746 (1966) (governmental-affairs privilege applicable to a report of a health department inspection); *Gawel* v *Chicago American Publishing Co*, 1 Ill App 3d 481; 274 NE2d 628 (1971) (governmental-affairs privilege covered misidentification of arrestee based on information from police and jail officials).

We think a fair reading of the "public and official proceedings" language of the instant legislation would dictate that it is intended to cover at least the more limited common-law privilege to report judicial proceedings, but is not by its very language intended to be a "government action," "arrest record," or "public records" privilege.[5] If such a broader scope had been intended, the necessary words could easily have been employed.

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[5] The *Phillips* court contrasted the "hotline" with an actual arrest record.

> "Not being an arrest record nor a record required by statute or some other authority, but instead merely constituting a hearsay statement by police of facts of a case, the hot line will not qualify as an official record for purposes of this privilege." *Id.*, p 89.

We do not read MCL 600.2911 (3); MSA 27A.2911 (3) as including a "public records" privilege within its reference to "public and official proceedings."

Other states hold that reports of arrests are privileged, but they do so pursuant to specific privileges governing arrest reports or "public reports," generally. See, e.g., *Commercial Publishing Co* v *Smith*, 149 F 704, 706 (CA 6, 1907); *Francois* v *Capitol City Press*, 166 So 2d 84, 89 (La App, 1964); *Piracci* v *Hearst Corp*, 263 F Supp 511, 513 (D Md, 1966). It is not suggested by the parties, nor has our research indicated, that Michigan has such a privilege. Moreover, the language of the official proceedings statute is not broad enough to include such a privilege within its meaning.

The defendant claims that the information at issue here was part of the police report, even though it was received orally from the officers, and therefore privileged. For the same reason that an arrest is not covered, neither is the police record of the arrest. We are not dealing here with a public-record privilege.

Black's Law Dictionary (5th ed), defines "proceeding" in part as follows:

> "In a general sense, the form and manner of conducting juridical business *before a court or judicial officer.* Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment . . . .
>
> "An act which is done *by the authority or direction of the court, agency, or tribunal,* express or implied; an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right . . . . The proceedings of a suit embrace all matters *that occur in its progress judicially.*" (Emphasis added.)

The words "official proceeding" evoke notions of adjudicatory action, rather than of government action generally. The term "official proceeding" may be broader than "judicial proceeding,"[6] but does not in our view encompass all actions of all government officials.[7]

We conclude that an arrest that amounts to no more than an apprehension is not a "proceeding" under the statute. Accordingly, the information orally furnished to the defendant in support of it does not, as such, enjoy the privilege afforded by the "public and official proceedings" statute.[8]

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[6] **Administrative and quasi-judicial proceedings may be included, but we do not find it necessary to make that determination in this case.**

[7] **We note that such a broad reading of the statute to cover all government actions would have largely duplicated the scope of the common-law public-interest privilege discussed below.**

[8] **Defendant's argument that "accurate reporting of public records . . . is constitutionally protected" is based on *Cox Broad-***

(*concluded on page A-97*)

A. History

We next address the defendant's contention that, in the absence of the application of the statutory privilege, Michigan's long-recognized qualified public-interest privilege protects this publication and its alleged factual errors in the absence of malice. If such a privilege is applicable, plaintiff would be required to prove that defendants published the report with knowledge of its falsity or with reckless disregard for the truth.[9] Plaintiff would be required to show malice in addition to the elements necessary to demonstrate liability for defamation:

> "(a) a false and defamatory statement concerning plaintiff; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation *per quod*)." 3 Restatement Torts, 2d, § 558. *Postill* v *Booth Newspapers*, 118 Mich App 608, 618; 325 NW2d 511 (1982).

(*continued from page A-96*)

casting Corp v *Cohn*, 420 US 469; 95 S Ct 1029; 43 L Ed 2d 328 (1975), in which the accurate identity of a victim of a sexual assault was secured from an official report and was, therefore, privileged from invasion of privacy liability. This argument is misplaced because the authority supports a constitutional defense of truth and absence of fault, rather than, as alleged here, a defense of privilege in the face of an alleged defamatory publication.

[9] In *Arber* v *Stahlin*, 382 Mich 300; 170 NW2d 45 (1969), we held that the existence of "actual malice, defined as knowledge of falsity or reckless disregard of the truth, is a question of fact. Since we are abandoning the former common-law qualified public-interest privilege, it is unnecessary in this case to make any distinction between the constitutional and common-law definitions of malice. See *Peisner II*, 421 Mich 137, n 12.

In advance of this analysis, it is important to set forth what the lower courts have *not* found and as a result, what this case is *not* about. It has not been found that the newspaper report of the plaintiffs arrest and the reasons for the arrest were false. Nor has it been found that, if false, there is liability resulting from negligence. Finally, were there a finding of falsity and negligence, there has been no finding that the plaintiff was damaged thereby.

The question presented is whether the trial court was in error in denying the plaintiff an opportunity to prove that the publication was false, that the falsity resulted from a standard of fault less than malice, and that the plaintiff was damaged thereby.[10] The Court of Appeals acknowledged the existence of a public-interest privilege, but it differentiated between matters that "promote the public interest and matters which are merely interesting to the public," finding the arrest in this case to fall within the latter category. It therefore declined to apply the privilege. We again arrive at the same result, but by way of a different analysis.

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[10] **We take special care to articulate the exact questions before us in response to hyperbolical statements of defendant and amicus curiae as to the effect of the judgment of the Court of Appeals. (E.g., "Rather, the plaintiff's libel case is ultimately premised on the theory that the Enquirer & News may be held liable to the plaintiff for accurately reporting his arrest because the plaintiff was not ultimately found guilty of the crimes for which he was arrested.") (Defendant's Brief, p 4.)**

> **"In short, the Court of Appeals held that a news organization that accurately reports on a person's arrest, the felony charges brought against that person, and the reasons for the arrest and charge is subject to a defamation action over that accurate reporting unless the person is ultimately proven to be guilty of the crime beyond a reasonable doubt." (Amicus brief in support of defendant appellant by the Evening News Association, Detroit Free Press, Inc. and WXYZ, Inc., p 2.)**

The qualified privilege to report on matters in the public interest is deeply rooted in Michigan jurisprudence. A qualified privilege, generally, provides

> "a conditional right to publish otherwise defamatory remarks because the defendant is advancing some interest of social importance . . . . Where a qualified privilege exists, plaintiff, in order to recover, must affirmatively prove actual malice on the part of the defendant." *Walker* v *Cahalan*, 97 Mich App 346, 356; 296 NW2d 18 (1980), citing *Lawrence* v *Fox*, 357 Mich 134; 97 NW2d 719 (1959).

In *Miner* v *Detroit Post & Tribune Co, supra*, this Court's earliest expression on the subject, a public official ("police justice" of the City of Detroit) claimed to have been harmed by a newspaper article. Justice Cooley, in approving of the privilege that distinguishes matters of public interest from mere gossip, reasoned:

> "I know of nothing more likely to encourage the license of a dissolute press than to establish the principle that the discussion of matters of general concern involving public wrongs and the publication of personal scandal come under the same condemnation in the law; for this inevitably brings the law itself into contempt and creates public sentiment against its enforcement." *Miner, supra*, p 364.

Closely thereafter, in *Bacon* v *Michigan Central R Co*, 66 Mich 166; 33 NW 181 (1887), we said that a qualified privilege was held to

> "extend[] to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is not a legal one,

> but where it is of a moral or social character of imperfect obligation." *Id.*, p 170.

The "duty" in that case ran to the defendant railroad employee, who had published an internal report noting that the plaintiff had been discharged for stealing. The Court reasoned that the employee who made the communication owed a duty to the company in the capacity of personnel agent. We observed:

> "It is not only proper, but it is of the utmost importance to the company, and to the public having business transactions with it, that the servants employed by it shall be men of good character . . . ." *Id.*, p 171.

In applying the duty/interest privilege, somewhat different from the public-interest privilege, the *Bacon* court noted that "[t]he occasion determines the question of privilege. The language is only proper to be considered in connection with the question of malice." *Id. Bacon* also emphasized that "[t]he great underlying principle upon which the doctrine of privileged communication stands, is public policy." *Id.*, p 169.

In a line of cases following *Bacon*, we continued to adhere to those privileges. The latest discussion[11] of the public-interest privilege to emerge from this Court appears in *Lawrence* v *Fox*, 357 Mich 134; 97 NW2d 719 (1959).[12]

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[11] It was our last treatment of the subject, except for a brief reference to it in *Peisner* v *Detroit Free Press*, 421 Mich 125; 364 NW2d 600 (1984) (*Peisner II*), discussed below.

[12] In *Lawrence*, only three justices signed the majority opinion. The remaining three participating justices concurred in the result only.

In contrast to Justice Boyle, we do not believe that *Lawrence* applied the fair-comment privilege. *Lawrence* is generally cited as, and we also find it to be, the most recent articulation of the public-interest privilege by this Court.

In *Lawrence*, the deputy superintendent of police in Detroit sued several newspapers for the publication of a series of articles charging him with fraud, corruption, and various other violations of the public trust. Plaintiff asserted the falsity of the charges and maintained that defendants had acted in bad faith and out of a desire to "ruin him."

After tracing the historical roots of privilege in defamation law and noting that privilege necessarily "rests upon considerations of public policy," *id.*, p 137, we once again observed that

> "[t]he occasion determines the question of privilege. The language is only proper to be considered in connection with the question of malice." *Id.*, p 140.

We further observed:

> "There is no need, at this date in our history, to urge that it is necessary to free institutions that the press itself be free. Today it is. The real issue before us is how free. Governmental interference is not the only threat to its freedom. On the contrary, a narrower or restrictive interpretation of the law of privilege in libel actions is equally dangerous. The publisher often faces a cruel dilemma: The more serious the charge of wrongdoing by a public official, more urgent the need for its airing. Yet, the more serious the charge, the greater the libel. It is in this uneasy and menacing situation that the law provides the publisher a sanctuary of sorts, the defense of privilege." *Id.*, p 137.

Thus, at the time we decided *Lawrence*, in 1959, the public-interest privilege applied to an "occasion," not to the status of the parties, even though the principle

cases dealing with this privilege involved public official plaintiffs. The "policy" to be achieved was obvious, although not often articulated: encouragement of a free flow of information about public concerns. Also at that time, the constitutional dimensions of the law of defamation could be simply stated: "[L]ibelous utterances are not within the area of constitutionally protected speech." *Roth* v *United States*, 354 US 476, 483; 77 S Ct 1304; 1 L Ed 2d 1498 (1957). As Justice White noted in 1974,

> "For some 200 years — from the very founding of the Nation — the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures." *Gertz* v *Robert Welch, Inc*, 418 US 323, 369-370; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

In *New York Times* v *Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 686 (1964), the constitutionally dictated change in the state of libel law began when the United States Supreme Court held that the constitutional guarantees of the First and Fourteenth Amendments required a rule prohibiting "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice,'" defined as knowledge of falsity or reckless disregard for the truth. *Id.*, pp 279-280. Thus, the United States Supreme Court in *New York Times* focused on the status of the plaintiff when it created the constitutional standard.

Curtis Publishing Co v *Butts*, 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094, reh den 389 US 889 (1967), continued the focus on the status of the plaintiff when it extended

application of the *New York Times* standard to cases involving public-*figure* plaintiffs. Public figures were defined by a concurring justice as nonpublic officials who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.*, p 164 (Warren, C.J., concurring in result).

In the next relevant case, *Rosenbloom* v *Metromedia, Inc*, 403 US 29; 91 S Ct 1811; 29 L Ed 2d 296 (1971), the Court, in a plurality opinion, departed, *albeit* briefly, from using the status of the plaintiff as a criterion for constitutional protection from libel in the absence of malice. Justice Brennan, writing for the plurality, noted:

> "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety." *Id.*, p 43.

Although qualified privileges for the protection of mass-media defendants existed in some states prior to the *New York Times* case, they were "limited by numerous restrictions and were often narrowly construed." *AAFCO Heating & Air Conditioning Co* v *Northwest Publications, Inc*, 162 Ind App 671; 321 NE2d 580 (1974), cert den 424 US 913 (1976). They "traditionally recognized only statements of opinion as privileged; false statements of fact were never privileged." *Id.*, p 675.

However, Michigan was one of those states that had more than a fair-comment privilege.[13] It extended protection to nonmalicious errors of fact when they involved matters of public concern, at least when the case involved a public plaintiff.[14] With the release of the *Rosenbloom* opinion, Michigan's public-interest privilege was definitely subsumed within the constitutional ambit. In a case such as that before us, the only issue under *Rosenbloom* would have been whether the report of the arrest was within the public interest.

Our task in this case, however, has been complicated by the Supreme Court's withdrawal from *Rosenbloom* in *Gertz, supra. Gertz* held:

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13 **The "fair comment" privilege must be distinguished from the public-interest privilege at issue here. Although federal courts applying Michigan law have sometimes confused the fair-comment privilege with the qualified public-interest privilege, see, e.g., *Schultz* v *Reader's Digest Ass'n*, 468 F Supp 551, 562 (ED Mich, 1979); *Orr* v *Argus-Press Co*, 586 F2d 1108, 1111 (CA 6, 1978), the fair-comment privilege "is involved only where the matter complained of is comment, as distinguished from statement of fact." Harper & James, *supra*, § 5.26, p 449.**

> **"The principle of 'fair comment' affords legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Id.*, § 5.28, p 456.**

The defendant's article about Mr. Rouch was a factual report, not an expression of opinion.

We obviously disagree with Justice Boyle's belief that the fair-comment privilege is somehow part of the public-interest privilege. See Slip Op., p 2. It is a completely separate privilege which is inapplicable to this case and is unaffected by the analysis advanced here. Our finding that the public-interest privilege has been partially subsumed in the constitutional privilege, and is no longer necessary in Michigan, has no bearing on the continuing viability of other common-law privileges not addressed here.

14 **Whether the Michigan public-interest cases were limited to public official plaintiffs is duscussed below.**

> "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.*, p 347.

The *Gertz* court also held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.*, p 349.

In the most recent United States Supreme Court case on the subject, the constitutional privilege was further defined. *Philadelphia Newspapers, Inc* v *Hepps*, ___ US ___; 106 S Ct 1558; 89 L Ed 2d 783 (1986), held that, in a defamation case involving a private-person plaintiff, but speech of public concern, the plaintiff must bear the burden of proving falsity. A Pennsylvania statute had required the defendant to bear the burden of proving truth in all cases. The Court clarified that "[w]hen the speech is of exclusively private concern and the plaintiff is a private figure, . . . the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Id.*, 89 L Ed 2d 792. In the area of burden of proof, then, the Court has shifted its focus somewhat from the status of the plaintiff to the subject of the speech.

Thus, in a relatively short period of time, during which we have not had an opportunity to revisit the qualified public-interest privilege question, the law of libel has been significantly altered. Much of what was the policy-based law of libel in Michigan prior to *New York Times* and its progeny, has now become constitutionally mandated. How much in the way of privilege remains outside of the constitutional ambit and what to do with it is the issue that now requires our attention.

Although our pronouncements have never explicitly limited application of the public-interest privilege to a public official or a public figure, it is also true that we have never applied the privilege in a case involving a strictly private-person plaintiff. *Miner* v *Detroit Post & Tribune Co, supra* (plaintiff was a "police justice" of the City of Detroit; *Fortney* v *Stephan*, 237 Mich 603; 213 NW 172 (1927) (plaintiff was a sheriff); *Timmis* v *Bennett*, 352 Mich 355; 89 NW2d 748 (1958) (plaintiff was a police department employee); *Lawrence* v *Fox, supra* (plaintiff was a deputy superintendent of police).[15]

Also, in *Lawrence* and other cases, our analysis relied to some extent on the status of the plaintiff as a public official.

> "The immunity of the conditional privilege, then, fragile though it may be, is not without value to the defendant charged with defamation. The newspaper (or any) publisher, commenting upon the performance of duties *by a public official*, stands before the jury initially (unlike the malevolently officious fishwife) wearing his vulnerable cloak of privilege. It is the plaintiff's burden to destroy it, to prove such abuse that the privilege is lost." *Lawrence, supra*, pp 143-144 (emphasis added).

Likewise, in *Timmis, supra*, p 369, we emphasized that the communication was one criticizing "the acts of members of the police department." Thus, *Miner, Fortney, Timmis*, and *Lawrence* all involved persons who

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15 **Although *Bacon, supra*, involved a private-person plaintiff, it is questionable whether in that case a "public interest" privilege was applied. Rather, the privilege that protected the defendant personnel agent in *Bacon* may be termed a "shared interest" privilege, which is founded on the need to share information about private persons in commercial or other relationships.**

would now likely be considered "public officials or figures" under the constitutional standard. Those cases are arguably limited to situations involving public plaintiffs.

Such is not the case in the Michigan Court of Appeals, however. That Court has moved beyond *Lawrence* and the earlier cases discussed, and it has explicitly recognized a qualified privilege to report on matters of public interest in cases involving *private*-figure plaintiffs. See *Peisner* v *Detroit Free Press*, 82 Mich App 153; 266 NW2d 693 (1978) (interlocutory appeal) (*Peisner I*). The federal courts, applying Michigan law, have accepted *Peisner I* as the law of Michigan. See *Bichler* v *Union Bank & Trust Co*, 745 F2d 1006, 1011 (CA 6, 1984) (en banc); *Schultz* v *Reader's Digest Assn*, 468 F Supp 551, 561 (ED Mich, 1979); *Apostle* v *Booth Newspapers, Inc*, 577 F Supp 962 (WD Mich, 1984). However, the same courts were careful to note that this Court had not spoken on the privilege since either *New York Times* or *Gertz*.

In *Peisner*, the plaintiff lawyer sued the defendant newspaper for libel on the basis of an article dealing with court-appointed lawyers that had accused the plaintiff of "inadequate representation of an indigent criminal defendant in appellate proceedings and with unethical conduct." *Peisner* v *Detroit Free Press*, 104 Mich App 59, 62-63; 304 NW3d 814 (1981), aff'd but modified 421 Mich 125; 364 NW2d 600 (1984) ("malice" and damages issues) (*Peisner II*).

In *Peisner I*, which is the decision most relevant to the issue presented in the instant case, the defendant had claimed both the constitutional privilege, alleging that plaintiff was a "public figure," and the qualified privilege "on the grounds that the controversy was a matter of widespread public interest . . . ." *Peisner I*, p 156. The defendant had further claimed that the plaintiff had not

shown abuse of the privilege, in that he had not alleged facts from which malice could be inferred.

The Court of Appeals held that plaintiff Peisner was not a public figure as defined in *Gertz, supra.* It found the trial court's reason for finding him to be a public figure — the fact that "he was appointed to handle a criminal appeal — to be an insufficient basis for that finding. *Id.*, p 160.

As to the qualified privilege, the Court of Appeals cited the leeway granted to state courts in *Gertz,* and relied upon our earlier cases of *Bacon, Timmis,* and *Lawrence* in finding the privilege applicable to a private-figure plaintiff.[16] It noted:

> "Although [*Lawrence*] involved an article charging a public official with fraud and corruption, it is clear that it was not limited to publications concerning public officials . . . ." *Id.*, p 161.

The Court approved of the trial judge's holding

> "that the public's interest in the administration of justice gave rise to a qualified privilege to report on events affecting a judicial proceeding." *Id.*, p 163.

The panel in *Peisner I* found that a question of fact remained regarding the existence of malice, however, and it remanded for a trial on that issue. The definition of malice and the damages issue were appealed in *Peisner II,* which reached this Court.

Thus, it was *Peisner I* that expressly expanded the scope of the qualified privilege to encompass cases involving private-figure plaintiffs such as Mr. Rouch. The

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16 **But see the text at n 11: plaintiffs in the cited cases were all public persons.**

question of privilege was not appealed in *Peisner II*, and therefore, the instant case represents this Court's first opportunity to approve or disapprove of the privilege, interpreted by the Court of Appeals and by the federal courts applying Michigan law, as applicable in cases involving nonpublic plaintiffs.

As noted above, if one were to consider only the cases of this Court, there would be very little evidence of a public-interest privilege applicable in cases involving private-defamation plaintiffs. However, in *Peisner II*, we acknowledged the privilege as enunciated by the Court of Appeals.

Peisner II held that exemplary and punitive damages for libel may be awarded only upon a finding that defendant acted with common-law malice, defined as ill will or bad faith. However, in the process of deciding the issues presented in that case, this Court

> "[r]ecognize[d] that a private defamation plaintiff must face an imposing array of barriers to recover exemplary and punitive damages. In this case, for example, plaintiffs were required to prove constitutional 'actual malice' — *i.e.*, knowledge of falsity or reckless disregard for the truth — *simply to defeat defendants' qualified privilege to report on matters in the public interest* and thereby establiish liability for actual damages." *Id.*, 421 Mich 137.

The defendant points to our language in *Peisner* as an implicit acceptance of the *Rosenbloom* standard as a matter of Michigan common law.

Other Court of Appeals cases have also recognized the private-person public-interest privilege. However, some, like the panel in this case, found the subject matter to be outside the scope of the public-interest privilege.

In *Weeren* v *Evening News Ass'n*, 2 Mich App 74; 138 NW2d 526 (1965), rev'd on other grounds 379 Mich 475; 152 NW2d 676 (1967), the Court of Appeals applied the privilege in a case involving the defendant television station's airing of a documentary about the circumstances surrounding plaintiff's donation of a bell to a leper colony. The Court also recognized the privilege in *Postill* v *Booth Newspapers, supra*, however, because that case was brought by a public-official plaintiff (the Washtenaw County Sheriff), it comports with this Court's narrower definition of the privilege. *Gaynes* v *Allen*, 128 Mich App 42; 339 NW2d 678 (1983), represents an expansive interpretation of the privilege. In that case, the Court of Appeals applied it to a case involving a publication about the private plaintiff's alleged incompetency in the profession of optometry. Likewise, in *Dienes* v *Associated Newspapers, Inc*, 137 Mich App 272; 358 NW2d 562 (1984), a Court of Appeals panel applied the privilege in a case involving a news report about the health of a private-person plaintiff's cows. In *Nabkey* v *Booth Newspapers*, 140 Mich App 507; 364 NW2d 363 (1985), the panel recognized the privilege, but cited *Rouch* and declined to apply it to the defendant newspaper's alleged false report of the details of the plaintiff's arrest and arraignment: "[T]he report of plaintiff's alleged activity did not contribute to the public's interest in reducing or detecting crime, but merely provided interesting or amusing reading for the public." *Id.*, p 513. Finally, in *Kurz* v *Evening News Ass'n*, 144 Mich App 205; 375 NW2d 391 (1985), another panel applied the privilege to a case involving a newspaper report about the plaintiff's (a Detroit attorney) arraignment on charges of assaulting a police officer.

Whether the Court of Appeals is correct in interpreting our pre-*New York Times* public-interest privilege decisions as covering nonpublic persons is less impor-

tant than what the state of the law ought to be in the wake of a veritable revolution in First Amendment defamation law. It is from this broader perspective that we consider the issue presented.

B. Analysis of the Public-Interest Privilege

In this section, we address the fundamental question after *Gertz:* Should there be a qualified public-interest privilege applicable in cases involving nonpublic plaintiffs that is more protective than the constitutional minimum requirements now in place for publications involving both private and public persons? We answer that question in the negative and hereby adopt the *Gertz* negligence standard in such cases. We decline the opportunity to create further tests and standards to be applied in libel cases involving claims of a public-interest privilege, when the constitutional standard more than adequately addresses the policy concerns that prompted our formulation of the common-law privilege in the nineteenth century and that would militate in favor of one at this time were there inadequate constitutional protection. Our decision is in keeping with the majority of states that have considered this question, and comports with a careful balancing of the very weighty policy concerns that necessarily influence a decision in the area of libel privilege.

1. Foreign Jurisdictions

Our survey of states that have responded to the *Gertz* challenge indicate that twenty-three states and the District of Columbia have expressly adopted the *Gertz* negligence standard as a matter of state law.[17]

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17 **ARIZONA:** ***Peagler*** **v** ***Phoenix Newspapers, Inc,*** **114 Ariz 309; 560 P2d 1216 (1977);**

ARKANSAS: ***Dodrill*** **v** ***Arkansas Democrat Co,*** **265 Ark 628; 590 SW2d 840 (1979), cert den 444 US 1076 (1980);**

(*concluded on page A-112*)

Eight states have assumed without discussion that *Gertz* represents the proper standard in cases involving

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(*continued from page A-111*)

DISTRICT OF COLUMBIA: *Phillips* v *Evening Star Newspaper Co*, 424 A2d 78 (DC App, 1980), cert den 451 US 989 (1981);

FLORIDA: *Miami Herald Publishing Co* v *Ane*, 423 So 2d 376 (Fla App, 1982);

HAWAII: *Cahill* v *Hawaiian Paradise Park Corp*, 56 Hawaii 522; 543 P2d 1356 (1975);

ILLINOIS: *Troman* v *Wood*, 62 Ill 2d 184; 340 NE2d 292 (1975);

KANSAS: *Gobin* v *Globe Publishing Co*, 216 Kan 223; 531 P2d 76 (1975);

KENTUCKY: *McCall* v *Courier-Journal & Louisville Times Co*, 623 SW2d 882 (Ky, 1981), cert den 456 US 975 (1982);

LOUISIANA: *Wilson* v *Capital City Press*, 315 So 2d 393 (La App, 1975);

MARYLAND: *Jacron Sales Co* v *Sindorf*, 276 Md 580; 350 A2d 688 (1976);

MASSACHUSETTS: *Stone* v *Essex Co. Newspapers, Inc*, 367 Mass 849; 330 NE2d 161 (1975);

NEW HAMPSHIRE: *McCusker* v *Valley News*, 121 NH 258; 428 A2d 493 (1981), cert den 454 US 1017 (1981);

NEW MEXICO: *Marchiondo* v *Brown*, 98 NM 394; 649 P2d 462 (1982);

OHIO: *Thomas H Maloney & Sons, Inc* v *E W Scripps Co*, 43 Ohio App 2d 105; 334 NE2d 494 (1974), cert den 423 US 883 (1975);

OKLAHOMA: *Martin* v *Griffin Television, Inc*, 549 P2d 85 (Okla, 1976);

SOUTH CAROLINA: *Jones* v *Sun Publishing Co*, 278 SC 12; 292 SE2d 23 (1982), cert den 459 US 944 (1982);

TENNESSEE: *Memphis Publishing Co* v *Nichols*, 569 SW2d 412 (Tenn, 1978);

TEXAS: *Foster* v *Laredo Newspapers, Inc*, 541 SW2d 809 (Tex, 1976), cert den 429 US 1123 (1977);

UTAH: *Seegmiller* v *KSL, Inc*, 626 P2d 968 (Utah, 1981);

VIRGINIA: *Gazette, Inc* v *Harris*, 229 Va 1; 325 SE2d 713 (1985), cert den sub nom *Fleming* v *Moore*, 53 USLW 3895 (1985), sub nom *Port Packet Corp* v *Lewis*, 53 USLW 3911 (1985);

WASHINGTON: *Taskett* v *King Broadcasting Co*, 86 Wash 2d 439; 546 P2d 81 (1976);

WEST VIRGINIA: *Havalunch, Inc* v *Mazza*, 294 SE2d 70 (W Va App, 1982);

WISCONSIN: *Denny* v *Mertz*, 106 Wis 2d 636; 318 NW2d 141 (1982), cert den 459 US 883 (1982).

private plaintiffs, and, in two states, federal courts have interpreted state law as having adopted *Gertz*.[18] By contrast, only four states have expressly adopted the *Rosenbloom* public-interest standard,[19] and one of those cases was a federal court's interpretation of state law.[20] New York has adopted neither the *Gertz* nor the *Rosenbloom* standard, opting instead for a gross-negligence standard. See *Chapadeau* v *Utica Observer-Dispatch, Inc*, 38 NY2d 196; 379 NYS 2d 61; 341 NE2d 569 (1975).

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[18] MISSISSIPPI: *Brewer* v *Memphis Publishing Co*, 626 F2d 1238 (CA 5, 1980), cert den 452 US 962 (1981);

PENNSYLVANIA: *Mathis* v *Philadelphia Newspapers, Inc*, 455 F Supp 406 (ED Pa, 1978).

[19] ALASKA: *Gay* v *Williams*, 486 F Supp 12 (Alas, 1979) (Construing Alaska law);

CALIFORNIA: *Rollenhagen* v *City of Orange*, 116 Cal App 3d 414; 172 Cal Rptr 49 (1981);

COLORADO: *Diversified Management, Inc.* v *Denver Post, Inc*, 653 P2d 1103 (Colo, 1982); *Walker* v *Colorado Springs Sun, Inc*, 188 Colo 86; 538 P2d 450 (1975);

INDIANA: *AAFCO Heating & Air Conditioning Co* v *Northwest Publications, Inc*, 162 Ind App 671; 321 NE2d 580 (1974), cert den 424 US 913 (1976).

See Anno: *State constitutional protection of allegedly defamatory statements regarding private individuals*, 33 ALR4th 212, for a detailed discussion of the states' application of the various fault standards.

[20] Section 580B of the 3 Restatement of Torts, 2d, is in keeping with the majority rule. It provides:

> "580B. Defamation of Private Person
>
> "One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
>
> "(a) knows that the statement is false and that it defames the other,
>
> "(b) acts in reckless disregard of these matters, or
>
> "(c) *acts negligently in failing to ascertain them.*"

(Emphasis added).

The rationale most often given for adoption of a negligence standard is that first enunciated in *Gertz, supra:* "[P]rivate individuals are more deserving of protection because, as a class, they are less likely to seek public attention and comment." *Foster* v *Laredo Newspapers, Inc,* 541 SW2d 809, 819 (Tex, 1976). The Supreme Court of Tennessee reasoned that only the *Gertz* negligence standard "'recognizes that the special needs of the private plaintiff require a more stringent standard of liability than is imposed when the plaintiff is a public figure or official who has ready media access and has voluntarily assumed the risk of defamatory comment by placing himself in the public eye.'" *Memphis Publishing Co.* v *Nichols,* 569 SW2d 412, 418 (Tenn, 1978), quoting Note, *State court reactions to* Gertz v Robert Welch, Inc, 29 Vand L R 1431, 1444 (1976).

State courts that have adopted a negligence standard also rely heavily on their own state constitutions as support for their decisions.[21] The state constitutions have been used most often as support for placing greater emphasis on privacy rights. See, e.g., *Troman* v *Wood,* 62 Ill 2d 184; 340 NE2d 292 (1975); *Gobin* v *Globe Publishing Co,* 216 Kan 223; 531 P2d 76 (1975); *McCall* v *Courier-Journal & Louisville Times Co,* 623 SW2d 882 (Ky, 1981), cert den 456 US 975 (1982); *Martin* v *Griffin Television, Inc,* 549 P2d 85 (Okla, 1976), *Gazette, Inc* v *Harris,* 229 Va 1; 325 SE2d 713, 725 (1985); *Denny* v *Mertz,* 106 Wis 2d 636; 318 NW2d 141 (1982).

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21 **The Michigan Constitution provides:**

> **"Every person may freely speak, write, express and publish his views on all subjects, *being responsible for the abuse of such right;* and no law shall be enacted to restrain or abridge the liberty of speech or of the press." Const 1963, art 1, § 6 (emphasis added).**

In *Troman, supra,* p 195, the Illinois Supreme Court observed:

> "The freedom of speech provisions . . . recognizes the interest of the individual in the protection of his reputation, for they provide that the exercise of the right to speak freely shall not relieve the speaker from responsibility for his abuse of that right." See also *Gobin, supra,* pp 231-233.

The Kentucky Constitution was also found to mandate "a standard which adequately protects the private individual from defamation." *McCall, supra,* p 886. In *Martin, supra,* p 92, the Oklahoma Supreme Court explicitly distinguished the language of the Oklahoma Constitution from that of the federal constitution. Like the previously mentioned state constitutions and our own, the free speech provision of the Oklahoma Constitution requires "'[e]very person . . . [to be] responsible for the abuse of that right; . . . .'" Okla Const, art II, § 22. The *Martin* court thus found the negligence standard to be "more parallel with" the Oklahoma Constitution. The Wisconsin Supreme Court also concluded that its state constitution does not provide for broader free press rights than does the federal constitution. *Denny, supra;* 655, n 27.[22]

Other state courts relied on state statutes or the common law as justification for adopting the negligence standard for private-person-plaintiff cases. See *Phillips* v *Evening Star Newspapaer Co, supra; Troman, supra,* pp 194-196; *Denny, supra,* p 656. At least one state court

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[22] **We have not been asked to find a standard under the Michigan Constitution higher than that provided in *Gertz.***

perceived practical advantages in adopting the negligence standard.

> "The application of the negligence standard in tort cases is so well established that juries can safely be expected to comprehend the term when applied in defamation cases. Nor is the negligence standard unknown to common law defamation." *Jacron Sales Co, Inv* v *Sindorf*, 276 Md 580, 596; 350 A2d 688 (1976).

A final, and perhaps most significant, reason for state court rejection of anything but a negligence standard emanates from the courts' understanding and interpretation of public policy. See *Miami Herald Publishing Co* v *Ane*, 423 So 2nd 376, 387 (Fla App, 1982); *Cahill* v *Hawaiian Paradise Park Corp*, 56 Hawaii 522, 533-534; 543 P2d 1356 (1975); *Troman, supra*, pp 194-196 (Illinois); *Gobin, supra*, pp 231-233 (Kansas); *Stone* v *Essex Co Newspapers, Inc*, 367 Mass 849, 856-857; 330 NE2d 161 (1975); *Seegmiller* v *KSL, Inc*, 626 P2d 968, 973 (Utah, 1981); *Taskett* v *King Broadcasting Co*, 86 Wash 2d 439, 448-450; 546 P2d 81 (1976); *Denny, supra*, ; 656 (Wisconsin). The nonconstitutional policies cited by state courts are numerous, but, generally, the courts tend to focus on the seriousness of the injury to the allegedly defamed parth.

The Florida Supreme Court, for example, stressed the important role that the defamation action plays in a free society.

> "[It] represents the individual's sole remedy against the occasional excesses of the print and electronic media which often have vast resources to inflict untoward damage upon an individual. Surely, a decent, open society cannot, in the name of press and speech freedom, so thor-

> oughly undermine this remedy as to render it useless to those people who have been damaged by a defamatory falsehood negligently uttered in the mass media and have not in any way sought the pubic limelight." *Miami Herald, supra,* p 387.

The Massachusetts Supreme Court likewise emphasized the *state's* interest in the individual's reputational protection, "for this 'reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.'" *Stone, supra,* p 858, quoting *Rosenblatt* v *Baer,* 383 US 75, 92; 86 S Ct 669; 15 L Ed 2d 597 (1966) (Stewart, J., concurring). The Utah court equated freedom from defamation with freedom from physical violence.

> "[W]e recognize that the integrity of an individual's reputation is essential to his standing in society, in his vocation, and even in his family. It may indeed be indispensable to one's sense of self-worth. The dignity of virtually every human being depends in part upon his right to be known as the person he truly is. For centuries it has been recognized that an assault upon a person's character may be far more damaging and long-lasting than an assault upon his person. Indeed, freedom from false attacks on one's personality may be viewed as at least as essential to ordered liberty as freedom from physical abuse." *Seegmiller, supra,* p 973.

The courts employed these policies and reasons for distinguishing between public and private individuals. Offering the protection of privilege to all matters of public interest is often said to be too broad an extension of a "free press" privilege. The Illinois court noted

the infrequency of recoveries for actual malice and the fact that

> '[W]hether a matter is one of public interest, . . . depends to some degree on whether the media themselves have chosen to make it one." *Troman, supra,* p 196.

The Hawaii court envisioned the negligence standard as one way to "make defaming publishers less willing to speak due to the risk of being found negligent." *Cahill, supra,* p 533.

Those states adopting a *Rosenbloom* public interest–related standard relied most heavily on the constitutional arguments advanced by the *Rosenbloom* plurality, striking the balance in favor of free speech. See, e.g., *Walker* v *Colorado Springs Sun, Inc,* 188 Colo 86; 538 P2d 450 (1975), cert den *Woestendiek* v *Walker,* 423 US 1025 (1975); *Diversified Management, Inc* v *Denver Post, Inc,* 653 P2d 1103 (Colo, 1982); *AAFCO Heating & Air Conditioning Co.* v *Northwest Publications, Inc, supra.* While we appreciate the concerns articulated by the courts adopting the *Rosenbloom* standard, we find the balance struck by the United States Supreme Court in its development of the constitutional privilege to be sufficiently protective of free speech and provides the publisher with more than adequate "sanctuary" from the "cruel dilemma" we referred to in *Lawrence, supra,* 137.

2. United States Constitutional Policy

There are several tension lines along which, to some extent, the original tort-law qualified privileges were developed and along which the United States Supreme Court struggled in developing the latter-day First Amendment privileges. They are basically: the need to balance a free flow of information and ideas necessary to our concept of freedom and democracy with the tra-

ditional right of the individual to redress harm to reputation, and the effect of privilege on a public versus private figures.

These fundamental principles and the conflicts between them have been eloquently expressed in *New York Times* and its progeny.

> "Thus we consider this case against the background of a profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times, supra,* p 270.
>
> * * *
>
> "'The protection of the public requires not merely discussion, but information.'" *Id.,* p 272.
>
> * * *
>
> "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." *Id.,* pp 274-275.
>
> "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Philadelphia Newspapers, supra,* 89 L Ed 2d 794 (quoting *Gertz*).

These concerns are similar to those that we articulated in *Lawrence:*

> "There is no need, at this date in our history, to urge that it is necessary to free institutions that the press itself be free. Today it is. The real issue before us is how free. Governmental interference is not the only threat to its freedom. On the contrary, a narrow or restrictive interpretation of

> the law of privilege in libel actions is equally dangerous." *Id.*, p 137.

We find that the constitutional privilege that has evolved in the time period since *Lawrence* is neither narrow nor restrictive. Rather, it has equitably balanced the public's need to know with the individual's right to privacy.

As the Court noted in *Gertz*:

> "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. [*New York Times*, p 270.] They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz*, *supra*, p 340.

Especially in cases involving the interests of private individuals, the balancing process must not abandon the legitimate need to redress reputational injuries. As Justice Marshall expressed it,

> "The protection of the reputation of such anonymous persons 'from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty." . . . But the concept of a citizenry informed by a free and unfettered press is also basic to our system of ordered liberty. Here these two essential and fun-

damental values conflict." *Rosenbloom, supra,* p 78 (dissent).

In concurrence in *Rosenbloom,* Justice White emphasized that the policies supporting the *New York Times* standard were much less applicable in cases involving private persons.[23] Similarly, the *Gertz* majority concluded

> "that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." *Id.,* p 343.

The conflicting values debated in these watershed United States Supreme Court cases finally came to rest in a five-justice majority opinion in *Gertz,* in which it was said:

> "The legitimate state interest underlying the law of libel is the compensation of individuals for the

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23 One of those policies was the perceived threat of self-censorship by the media. However, Justice White has observed that that threat is much less of a potential cause for concern when the reputation of private citizens is at stake.

> "Some members of the Court seem haunted by fears of self-censorship by the press and of damage judgments that will threaten its financial health. But technology has immeasurably increased the power of the press to do both good and evil. Vast communication combines have been built into profitable ventures. My interest is not in protecting the treasuries of communicators but in implementing the First Amendment by insuring that effective communication which is essential to the continued functioning of our free society. I am not aware that self-censorship has caused the press to tread too gingerly in reporting 'news' concerning private citizens and private affairs or that the reputation of private citizens has received inordinate protection from falsehood. I am not convinced that we must fashion a consititional rule protecting a whole range of damaging falsehoods and so shift the burden from those who publish to those who are injured." *Rosenbloom, supra,* p 60 (White J., concurring).

> harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . . . In our continuing effort to define the proper accomodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise. . . . To that end, this Court has extended a measure of strategic protection to defamatory falsehood." *Gertz*, pp 341-342.

We believe that the United States Supreme Court has ably defined and provided for the protection necessary to ensure free and open debate of public issues. It should be remembered that, since *Gertz*, that Court has granted defamation defendants even greater protection by shifting the burden of proof of falsity when speech involving issues of public interest is at stake. *Philadelphia Newspapers, supra.*

3. The Michigan Rule

In defining the constitutional limits to the law of libel, it is understandable that the balancing scales tip in favor of constitutional interests rather than the individual reputational interests entrusted to tort law. Now that the constitutional limits have been clearly established, however, our task is to enunciate a tort-law policy that should be based on something less than the sacred ground of First Amendment rights. It is from that perspective that we find it unnecessary and unwise to extend a public-interest qualified privilege beyond what is constitutionally required.

Historically, libel law favored plaintiffs. Malice was presumed, see, e.g., *Bacon, supra,* p 172, truth was often the only defense, and punitive damages were commonly employed. See *Peisner II, supra,* 421 Mich 132. See gener-

ally, Justice White's historical summary of libel law in *Gertz, supra*, pp 371-376. Privileges evolved in response to the perceive harshness of the law of libel. As Prosser & Keeton note:

> "The courts developed a complex structure of privileges to protect and advance the societal and individual interests in the free flow of ideas and information. Much of the structure would have been unnecessary and much of the complexity resulting from the development of qualified privileges discussed hereafter could have been obviated if negligence, or something worse, with respect to truth or falsity of the matter published had been a prerequisite to recovery in any case." Prosser & Keeton, *supra*, § 114, p 815.

Since that time, then, constitutional law developments have changed most of the conditions that compelled the early tort-law privileges.

Under the *New York Times* standard, as it has developed, a publication about a public official or public figure is privileged in the absence of malice. Under *Gertz*, a communication is not constitutionally privileged if its subject involves a private person in the context of a matter of public interest; however, states are not permitted to impose liability without fault; nor can there be presumed or punitive damages without a showing of malice. In addition, when the speech is of public concern, a private-person plaintiff in a defamation suit has the purden of proving falsity. *Philadelphia Newspapers*. Thus, the Michigan common-law public-interest privilege has been constitutionally subsumed almost in its entirety.[24]

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[24] **As noted *supra*, in n 13, this conclusion has not effect on other recognized common-law privileges in Michigan.**

The "policy" behind the public-interest privilege has now been largely engrafted onto the penumbra of our First Amendment rights. The Unites States Supreme Court has chosen to formulate a constitutional privilege that is intended to advance "robust and wide-open debate" by measuring the "public" status of the injured parties, rather than the content of the publication. Speech content is considered only as regards the burden of proof of falsity.[25] Ours is not a constitutional mission, and it is not given to us to redesign that standard. We do not think we ought to fashion our state's tort law in a manner that would only fine tune the United States constitutional standard in one respect.

In summarizing our tort-law analysis of this issue, we first announce our value judgment that reputational interests are as important today, if not more so, as when the common law first recognized defamation as a tort. In an organized and centralized society, where at least economic relationships are likely to be based on an impersonal or reputational level as opposed to the more decentralized and personal approach characteristic of a bygone era, how we are perceived takes on greater significance. For better or worse, in today's world, most of us are known by our images.[26]

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25 If we were writing on a clean slate and ours were a constitutional mission, we might well be persuaded by the logic of the *Rosenbloom* standard. We note, for instance, that under the *Gertz* standard a public person receives no protection from a defamation relative to the person's private life, but a private person may be able to take advantage of the protective law of libel when there may be a public issue at stake. See *Smolla, Let the author beware: The rejuvenation of the American law of libel*, 132 U Pa L R 1 (1983).

26 See Boorstin, *The Image: A Guide to Pseudo-Events in America* (Magnolia, Mass: Peter Smith, Inc, 1984), for analysis of this modern phenomenon.

Secondly, it is obvious that the policy imperatives that led to the adoption of many of the qualified privileges, including the public-interest privilege, resulted from the then-existing harshness of the law of libel and the absence of any constitutionally based privilege. As described above, that harshness has been removed.

Finally, while reliance on rhetorical pronouncements and speculatiuon about "self-censorship" and "breathing room" are necessary to protect First Amendment freedoms, we look more to empirical evidence in search of a justification for sacrificing the tort-law protection for one defamed. We would not be adverst to upholding a public-interest privilege that would apply irrespective of the status of the defamed party if a strong societal interest, similar to the interests that compelled this privilege a century ago, were indicated. We are not convinced such is the case. It has not, for instance, been brought to our attention that in the over thirty states now applying a *Gertz* standard there has been any dimunition in the volume or quality of the reporting of arrests or, for that matter, any other subject.[27]

The policy question then, as we see it, is whether, in a time when the media has developed the technology, expertise, and resources to bring to our eyes and ears, on an hourly basis, detailed information on almost any subject from anywhere in the world, it is too much to ask or too detrimental to the liberalizing influence of

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[27] **One author has lamented the fact that as the courts have placed more barriers to tort recovery for publications there nonetheless has been an increase in the number of libel actions brought against media defendants and a corresponding increase in the number and value of verdicts. See Smolla, *supra*. We would only observe that while such a phenomenon could indicate a lack of adequate protection in the law, we also know that litigants and juries often send warning signals regarding a need to redress grievances or injuries not otherwise tended to in society.**

such a free flow of information that the task be exercised with reasonable care. We think not.

Other institutions have in recent years been subjected to increased pressures either from evolving principles of tort law or from increased use of that law, and, while in some cases it has been suggested that the availability of the product *involved would be lessened*, that has not always been shown to be the case. Although adherence to a standard of care in the publishing business could certainly involve costs, in our view such costs would not necessarily result in the restriction of a free flow of nonlibelous information. The raison d'etre of the media is to report news — as much and as quickly as possible. It is not likely that the exercise of such responsibility would shrink in the face of a reasonable-person standard of care.

The compelling reasons for the qualified public-interest privilege are now being served by heightened constitutional standards. The need to further sacrifice tort recovery for false defmation of a private person resulting from negligence has not been shown. Thus, we adopt the *Gertz* standard in place of the former public-interest privilege, and hold that this plaintiff was not required to show malice on the part of the defendant. We, therefore, affirm the Court of Appeals reversal of the trial court's grant of summary judgment.

Although we find that the former common-law public-interest privilege has been subsumed in the constitutional privilege, on remand, it will nevertheless be necessary to determine the "public interest" status of the communication in question in order to apply the *Philadelphia Newspapers* gloss on the constitutional rule. In the interest of judicial economy, and because the issue has been briefed, *albeit* in a slightly different context, we address this public interest question in

order to facilitate the trial judge's and the parties' understanding of the proper burden of proof of falsity.

IV.

BURDEN OF PROOF OF FALSITY

In applying the latest aspect of the constitutional law of libel, it is necessary to make the determination that defendants would have us make under the guise of state tort-law privilege: Namely, does the communication in question amount to "speech . . . of public concern"? *Philadelphia Newspapers, supra*, 89 L Ed 2d 787. If so, then the plaintiff, even though a private person, must bear the burden of proving the falsity of the communication, as he would have been required to do under the common-law qualified public-interest privilege. See *Bonkowski* v *Arlan's Dep't Store*, 383 Mich 90; 174 NW2d 765 (1970) (when qualified privilege applies, plaintiff must prove untruth). He need not go so far as to prove malice, however, as he would be required to do if we were to recognize that privilege and find it applicable. Justice O'Connor describe the applicable constitutional standard in *Philadelphia Newspapers*:

> "When the speech is of public concern but the plaintiff is a private figure . . . the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern." *Id.*, 89 L Ed 2d 792.

We find that the newspaper report of plaintiff's arrest that is at issue in this case of public concern, and that, therefore, under the constitutional rule, defendant is not required to prove the truth of the article as its defense. Rather, plaintiff must prove as part of his case, in addition to defendant's fault, that the statements at issue are false.

Although "public interest" is an elusive term, and may be said to include any matter reported on by the media,[28] we do not undertake here to establish the parameters of a term, the origins of which emanate from constitutional law and which will undoubtedly be further defined by the United States Supreme Court. Rather, we merely hold that the subject matter of the communication at issue here surely falls well within those parameters. In so holding, we decline to distinguish, as did the Court of Appeals, the essence of the article from its supporting facts or details.[29]

The subject deemed to be a matter of public concern in *Philadelphia Newspapers* was organized crime. The articles in question in that case had alleged that plaintiffs had links to organized crime and that they used those links to influence state government. Other "public interest" cases, although in the context of privilege, also involved organized crime or law enforcment activities. See *Rosenbloom* (article regarding plaintiff's arrest "on charges of possession of obscene literature"); *Gertz* (article dealing with prosecution of a Chicago policeman for second-degree murder portrayed the plaintiff lawyer as the architect of a "frame-up");[30] *Gay* v

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28 **The late Theodore H. White, reporter and historian, in his book, *In Search of History: A Personal Adventure* (New York: Harper & Row, Inc, 1978), p 206, spoke of "the power of the press to set the agenda of public discussion."**

29 **As defendant points out, the "details" given in the instant article were those which formed the probable cause necessary for making the arrest. Since the constitutional rule regarding burden of falsity emanates from First Amendment policies favoring a free and open society, the basis of an arrest would clearly fall within the definition of public interest.**

30 **Although *Gertz* rejects the public-interest *privilege* of *Rosenbloom*, it did not address the burden of proof of falsity issue. *Philadelphia Newspapers*, 89 L Ed 2d 792, characterized *Gertz* as a "private person/issue of public concern" case.**

Williams, 486 F Supp 12, 13 (Alas, 1979) (AP release about plaintiff, an "Alaska bush pilot accused in Arizona drug trafficking"); *Orr* v *Argus-Press Co*, 586 F 2d 1108, 1110 (Ca 6, 1978) (article reporting that plaintiff had been "charged in [a] shopping mall fraud"); *Schultz* v *Reader's Digest*, and *Schultz* v *Newsweek* (organized crime and the disappearance of Jimmy Hoffa); *Walker* (articles about plaintiff's alleged purchase of stolen goods).

As the plurality in *Rosenbloom* observed:

> "The community has a vital interest in the proper enforcement of its criminal laws, . . . : the public has an interest both in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to supress free expression[,]" *id.*, p 43,

or, we would add, to harass innocent persons. The court in *Gay*, *supra*, p 16, n 14, noted that "[c]riminal activities have consistently been recognized as matters of public interest."

Our own cases of *Fortney*, *supra*, and *Timmis*, *supra*, emphasized the fact that the published statements "concern[ed] acts of members of a law enforcement agency." *Id.*, p 370. The article in *Miner*, *supra*, reported on "the official conduct of those who fill offices of public trust and confidence, in the administration of which the whole community has an interest . . . ." *Id.*, p 360.

The rule of *Philadelphia Newspapers* does not impose an onerous burden on the private-person plaintiff, who must already show some degree of fault on the defendant's part. See *Gertz*. Thus, the possible effects of a broad interpretation of "pubic interest" are not nearly as serious as they would be in the context of a public-

interest *privilege*. In any case, at this point, we adopt a relatively narrow reading of that term for purposes of applying the constitutional rule.

We hold that a report of an arrest and of the facts used to establish the probable cause for the arrest amount to speech of public concern and that the rule of *Philadelphia Newspapers* applies. Because of the importance of this type of information in a free society, plaintiffs who choose to bring actions in libel on the basis of such reports must first prove that the statements were false in addition to proving that defendants were negligent in so reporting.

We affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

/s/ James H. Brickley
/s/ Charles L. Levin
/s/ G. Mennen Williams
/s/ Dennis W. Archer

CAVANAGH, J. (*concurring in part and dissenting in part*).

I concur in the analysis and conclusions drawn in parts II and III of the majority opinion. I question, however, the fourth section.

In section IV, the majority analyzes the proper burden of proof of falsity in a defamation case involving a media defendant and a private-figure plaintiff. To do so, the opinion discusses *Philadelphia Newspapers, Inc* v *Hepps*, ___ US ___; 106 S Ct 1558; 89 L Ed 2d 783 (1986). In that case, the United States Supreme Court held that in defamation cases involving private-figure plaintiffs and speech of public concern the plaintiff has the burden of proving falsity. In introducing this

analysis, the majority notes that in the present case the issue raised in *Philadelphia* "has been briefed, *albeit* in a slightly different context . . . ." (Majority opinion, p 31.) The majority concludes that the report of an arrest and of the facts used to establish probable cause for the arrest amount to speech of public concern, and thus at trial, plaintiff has the burden of proving falsity. I dissent from the inclusion of section IV for several reasons.

First, the parties did not raise the present issue. *Philadelphia* was decided on April 21, 1986. The parties' briefs were submitted to this Court in late 1985, and thus do not cite or discuss *Philadelphia*. Neither do the parties raise the issue resolved in *Philadelphia* providing the burden of proof of falsity.

Second, even if the parties had raised the question of burden of falsity, it is not clear that the issue would properly be before the Court. Unlike the majority, I think it is fairly clear that the article contained false information. The Court of Appeals also reached this conclusion.

> "The parties agree that the underlying facts behind the story are substantially false: plaintiff did not commit the rape. Although plaintiff was arrested for the crime, he was never charged." 137 Mich App 42-43; 357 NW2d 794 (1984).

The fact that defendant printed what arguably amounts to a retraction on December 3, 1980, supports a finding that falsity is not at issue. If there is no dispute as to the article's falsity, then the question who has the burden of proving falsity becomes irrelevant. It is precisely this question which *Philadelphia* addresses. The case creates a rule of law only for those cases in

which there is a factual dispute regarding the truth of the publication.[1]

Third, even if *Philadelphia* were applicable, I think this Court accepts an extra and inappropriate burden by discussing it. The trial lawyers and judge should bear the responsibility of raising the issue and determining whether the case applies. This Court's discussion of it is pure dicta; it was not necessary to the resolution of the case. The majority concludes that reversal of the summary judgment is mandated before it even addressed the *Philadelphia* issue. I would stop at that point.

Finally, I think the majority's application of the *Philadelphia* rule to the present case is erroneous. While the report of an arrest might amount to speech of public concern, I do not agree that the surrounding details do. Such details are exactly what plaintiff finds false and defamatory. I would conclude that most of the article did not contain speech of public concern for the reasons expressed by the Court of Appeals in its rejection of defendant's public-interest privilege argument. 137 Mich App 58.

/s/ Michael F. Cavanagh

Boyle, J. (*concurring in part and dissenting in part*).

While I agree with Justice Brickley that in a defamation suit involving a media defendant and a private

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[1] **I find the majority's opinion at least unclear on this point. The first sentence of the introduction states that the facts in the case are undisputed. Later, the majority says, "It has not been found that the newspaper report of the plaintiff's arrest and the reasons for the arrest were false." (Majority opinion, p 11.) The latter statement contradicts, without explanation, the Court of Appeals finding, and seems inconsistent with the introductory statement.**

plaintiff, absent the application of any common-law privilege, a negligence standard is appropriate, I do not agree, without further factual findings, that the official- and public-proceedings privilege provided by MCL 600.2911(3); MSA 27A.2911(3) is anapplicable in this case. Further, I wish to clarify that all of the common-law privileges traditionally available to all defendants, both media and otherwise, have not been "subsumed" by the constitutional mandates of *New York Times* v *Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), and *Gertz* v *Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974), and are still a vital part of the jurisprudence of this state.

Justice Brickley, in his analysis of this case, presumes that the "public-interest privilege" utilized by the Court of Appeals in such cases as *Weeren* v *Evening News Ass'n*, 2 Mich App 74; 138 NW2d 526 (1965), and *Dienes* v *Associated Newspapers, Inc*, 137 Mich App 272; 358 NW2d 562 (1984), has been subsumed by the constitutional requirement of *New York Times*, *supra*, which requires a finding of constitutional[1] malice before a public official or public figure may succeed in a defamation suit against a media defendant. The privilege utilized by the Court of Appeals to conditionally immunize news reports which are in the "public interest" appears to be a hybrid of two common-law[2] qualified privileges: communication to one who may act in the public

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[1] **Constitutional malice has been defined as knowledge that the defamatory statements are false or reckless disregard of whether they are false or not. *New York Times*, *supra*, 280.**

[2] **It must be noted that neither party nor amici curiæ in this case argues that the broad public-interest privilege applied in such cases as *Weeren*, *supra*, and *Dienes*, *supra*, is not actually a privilege recognized at common law.**

interest, which requires a narrow audience and which applies normally only to nonmedia defendants, see *Nuyen* v *Slater*, 372 Mich 654; 127 NW2d 369 (1964); and the privilege of fair comment on matters of public concern, which usually involves editorials or opinions on public officials and matters of public concern, see *Lawrence* v *Fox*, 357 Mich 134; 97 NW2d 719 (1959).

The broader "public-interest privilege" applied by the Court of Appeals has, as Justice Brickley suggests, been utilized exclusively to deal with media reports on matters of public interest. The rationale behind this "privilege" is identical to that espoused by the United States Supreme Court in *New York Times*, *supra*, and its progeny,[3] and I can only conclude that this "hybrid privilege" was utilized by the Court of Appeals to address the same constitutional concerns. As *New York Times* and *Gertz* have now set the standards required in this area, I agree that the use of a broad "public-interest privilege" to conditionally immunize reports of matters in the public interest, which it appears may have been unique to this state, is no longer necessary or appropriate.

However, it must be noted that the two traditional common-law privileges, from which this broad privilege appears to have grown, are still available to defendants in a defamation action in this state. This is important to

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[3] **Interestingly, in *Gertz* v *Robert Welch, Inc*, *supra*, 346, the United States Supreme Court noted that the public-interest rationale behind *New York Times* would be difficult to extend to private plaintiffs.**

> **"[I]t would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not — to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' . . . We doubt the wisdom of committing this task to the conscience of judges."**

note because nonmedia defendants may not be afforded the same constitutional protection as media defendants[4] and because the protection afforded by the privileges may be greater than that required by the constitutional standard of *Gertz*.[5]

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[4] Although traditionally the *New York Times* standard has been viewed as protecting media defendants, the rationale of that decision applies equally to nonmedia defendants. See Smolla, "*Let the author beware: The rejuvenation of the American law of libel*," 132 U Pa L R 1 (1983). However, it is probably true that the standards set forth in *Gertz*, *supra*, 347-348, are not applicable to nonmedia defendants.

> "This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation."

However, former Chief Justice Burger in his opinion in *Hutchinson* v *Proxmire*, 443 US 111, 133, n 16; 99 S Ct 2675, 61 L Ed 2d 411 (1979), noted that this issue had not been decided by the United States Supreme Court.

Prosser & Keeton, Torts (5th ed), § 113, p 808, suggest this confusion could be cleared up by requiring some degree of fault in all cases. "Much could be accomplished by way of simplifying the law and adequately protecting speech in the private area by way of requiring fault with respect to truth or falsity of the matter published in all situations. Most qualified privileges could then be abolished."

[5] I do not address the question whether, after *New York Times*, and *Gertz*, qualified privileges require a showing of common-law malice (ill will or bad motive) or constitutional malice (knowing that statements are false or reckless disregard for whether or not they are false). The Restatement takes the view that a showing of constitutional malice is now appropriate in the case of all qualified privileges:

> "A substantial minority of the cases at common law took this position. With the current familiarity with the constitutional standard of reckless disregard, arising from the case of *New York Times* v *Sullivan* (1964) 376 US 254, and the more frequent use of it in the abuse-of-privilege cases as a result, this standard seems to offer a felicitous solution. It is anticipated that as other courts realize the situation they will agree with it." 3 Restatement Torts, 2d, § 592A, p 260.

(*concluded on page A-136*)

A proper determination of this case, therefore, requires first that we decide whether such a privilege applies to the statements published by the defendant regarding Mr. Rouch's arrest. In the event that no such privilege exists, or if the privilege has been abused, or if it does not afford the constitutionally required standard of fault,[6] then it is appropriate to consider the proper standard of liability which should be applied under the dictates of *New York Times* and *Gertz*.

The rationale behind the common-law privileges in defamation cases, according to Prosser, is analogous to that behind the privileges availabie to defendants in assault and battery cases.

> "It rests upon the same idea, that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." Prosser & Keeton, Torts (5th ed), § 114, p 815.

The privileges are divided into two types: those which are absolute, immunizing defendants from liability without regard to their purpose or motive or the reasonableness of their conduct, and those which are qualified, requiring a showing of malice before there can be any recovery.

(*continued from page A-135*)

See also *Smolla*, n 4 *supra*, pp 79-80 ("The law of defamation will evolve much more coherently if ill-will malice is discarded altogether, and the knowing or reckless disregard of the truth standard is used for all conditional privileges, whether their pedigree is common law, constitutional, or both.").

6 See n 5.

Absolute immunity is granted in those situations in which "there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives." Prosser & Keeton, *supra*, § 114, p 816. Prosser & Keeton list six absolute privileges which are available to both media and nonmedia defendants.

The most commonly encountered of the absolute privileges is the privilege surrounding judicial proceedings.[7] This privilege immunizes statements made by judges in their judicial capacity and has been extended to cover, among others, grand and petit jurors, witnesses, counsel in the conduct of a case, parties in private litigation, defendants and instigators of prosecution. See 3 Restatement Torts, 2d, §§ 585-589, pp 244-252. Absolute privileges also cover: members of legislative bodies for acts in the performance of their duties, which has been extended to cover legislative witnesses, see Restatement, *supra*, § 590A; communications between certain governmental executive officers; instances where the plaintiff has consented to the publication; communications between husbands and wives; and political broadcasts required under § 315(a) of the Federal Communications Act of 1934 (47 USC 315[a]). *Farmers Educational & Cooperative Union of America, North Dakota Div* v *WDAY, Inc*, 360 US 525; 79 S Ct 1302; 3 L Ed 2d 1407 (1959). The Restatement is of the view that any publication required by law is also absolutely privileged. Restatement, *supra*, § 592A, p 257.

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[7] It appears that the majority may have confused this privilege with the separate and distinct privilege to report on official and public proceedings. Although some courts have extended the judicial-proceedings privilege to cover official publication of judicial opinions, it has not been viewed normally as exempting reports of judicial proceedings, but rather as foreclosing liability for statements made in the proceedings themselves. Reports of such statements were traditionally covered by the latter privilege.

The qualified privileges traditionally available to defendants, both media and otherwise, are intended to shield publishers from liability in a defamation suit, absent showing of malice.[8] Perhaps the one most commonly used is the privilege to communicate to one who may act in the public interest. This privilege, commonly called the "public interest" privilege, allowed publication to a restricted audience of matters in the public interest. As Prosser & Keeton note, this

> "involves communications made to those who may be expected to take official action of some kind for the protection of some interest of the public . . . . The privilege includes false statements of fact concerning the plaintiff made in good faith; but, although it is not impossible that communications to other non-official interested persons will be protected, publication to the world at large in a newspaper is not." Prosser & Keeton, *supra*, § 115, pp 830-831.

This "public interest" privilege has been found to cover communications by private citizens to proper authorities for the prevention or detection of crime, complaints about public officials' conduct, and complaints to school boards questioning teachers' competence. See Prosser & Keeton, *supra*, § 115, pp 830-831; *Nuyen* v *Slater*, *supra*.

Other qualified privileges, as noted by Prosser & Keeton, include: communications in the interest of the publisher and in the interest of others or in which the publisher and the recipient have a common interest; and the privilege to make fair comment on matters of

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8 **See n 4.**

public interest.[9] See *Lawrence* v *Fox*, *supra*. The Restatement also includes a privilege for statements made by inferior administrative officers not covered by the absolute privilege and for communications, under certain circumstances, which serve to protect the well-being of a member of the family.

Qualified or conditional privileges only protect those who do not abuse them. Traditionally, a qualified privilege is abused when the publication is made with malice, when the publisher does not act for the purpose of protecting the interest intended to be protected by the privilege, where there is excessive publication, where the publisher does not reasonably believe the publishing is necessary to accomplish the purpose of the privilege, or when one publishes unprivileged defamatory matter in addition to privileged publications. See Prosser & Keeton, *supra*, § 115, pp 832-835, and Restatement, *supra*, §§ 599, 600, 602, 605A, pp 286-297.

None of the foregoing absolute or conditional privileges is applicable in the case at bar. However, both

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[9] The Restatement takes the view that the privilege to make fair comment on matters of public interest may have been rendered obsolete by United States Supreme Court decisions and that opinions, in general, may no longer be considered defamation. Quoting *Gertz*, *supra*, 339, the Restatement surmises,

> "'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. . . .' This categoric statement was not necessary to the decision in the case in which it is found, and the Supreme Court's indications that an expression of opinion cannot be the basis of a defamation action have involved public communications on matters of public concern. Although it is thus possible that private communications on private matters will be treated differently, the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure, type." Restatement, *supra*, § 566, comment c, pp 172-173.

Prosser & Keeton, *supra*, § 115, pp 836-838, and the Restatement, *supra*, § 611, pp 297-302, detail what is described in both treatises as a special type of privilege to report on official or public proceedings. At common law, this privilege was conditional, yet some commentators argue that it is now constitutionally required to be an absolute privilege.[10]

According to the Restatement this privilege applies to all activities of government.

> "Report of Official Proceeding or Public Meeting
>
> "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported. Restatement, *supra*, § 611, p 297.

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[10] **In a recent article in the University of Illinois Law Review, it is suggested that the United States Supreme Court decisions in *Cox Broadcasting Corp* v *Cohn*, 420 US 469; 95 S Ct 1029; 43 L Ed 2d 328 (1975), and *New York Times*, require that states modify their application of the official-proceedings privilege.**

> **"*New York Times* and *Cox* have transformed the privilege to report on public proceedings. At common law, courts granted the publisher of defamatory matter in a report of an official act or proceeding a privilege only if the report was fair, accurate, and made without express malice. Constitutional privilege, however, absolutely protects such reports so long as the reports accurately depict the proceedings observed. . . .**
>
> **"A few states have enacted statutes that grant absolute immunity to accurate reports of public proceedings and documents. These statutes, like the *Second Restatement*, properly observe the first and fourteenth amendments' demand that dissemination of accurate information regarding the activities of governmental institutions be free from sanction." Workman, *Reports upon public proceedings and documents: Absolutely protected by constitutional privilege*, 1985 U Ill L R 1059, 1074-1075.**

This privilege existed according to Prosser & Keeton, *supra*, § 115, p 836, "upon the idea that any member of the public, if he were present, might see and hear for himself, so that the reporter is merely a substitute for the public eye — this, together with the obvious public interest in having public affairs made known to all."

Traditionally, a publication was privileged if it was a fair and accurate report of the official proceedings, although courts have allowed some leeway, most often finding that minor inaccuracies would not defeat the privilege. Embellishments of the facts in the official proceedings, however, would be an abuse and the publisher would lose the protection of the privilege. See, e.g., *McAllister* v *Detroit Free Press Co*, 76 Mich 338; 43 NW 431 (1889).

Most courts which have considered the question have applied the privilege to reports of official and criminal police proceedings. See, e.g., *Turnbull* v *Herald Co*, 459 SW2d 516, 520 (Mo, 1970), (privilege extends to "actions and activities of police officers, including the details and reasons for an arrest"); *Phillips* v *Evening Star Newspaper Co*, 424 A2d 78 (DC App, 1980) (information in arrest records and report of the fact of arrest privileged); *Francois* v *Capitol City Press*, 166 So 2d 84, 89 (La, 1964) (privilege to publish "fact that a person was arrested and the charges for which he is being held"); *Piracci* v *Hearst Corp*, 263 F Supp 511 (D Md, 1966); *Commercial Publishing Co* v *Smith*, 149 F 704, 706 (CA 6, 1907) ("[t]he publication of the fact that one has been arrested, and upon what accusation" privileged).

The Restatement and Prosser & Keeton also view reports of arrests as privileged under the official-proceedings privilege. The Restatement, often quoted by courts in this regard, notes:

> "An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section. On the other hand statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section. " Restatement, *supra*, comment h, § 611, p 301.

The scope of the official-proceedings privilege has been extended beyond reports of the official proceedings, themselves. Courts have also uniformly applied it to reports of any matter contained in official records which are part of the official proceedings, such as public court files. Prosser & Keeton, *supra*, § 115, p 836; *Cox Broadcasting Corp* v *Cohn*, 420 US 469; 95 S Ct 1029; 43 L Ed 2d 328 (1975); *Lotrich* v *Life Printing & Publishing Co*,[11] 117 Ill App 2d 89; 253 NE2d 899 (1969); *McAllister*, *supra*.

The privilege does not extend, however, to "unofficial talk of such officials as policemen, as distinct from their official utterances or acts, such as an arrest." Prosser & Keeton, *supra*, § 115, pp 836-837. We noted this in *McAllister*, *supra*, 356:

> "And the reporter of a newspaper has no more right to collect the stories on the street, or even

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[11] **Justice Brickley finds that *Lotrich*, *supra*, and several cases from other states, see slip op, p 9, are construing a broader privilege than that provided in Michigan. However, all of the cases involve the application of the same special common-law privilege reported in both Prosser & Keeton and the Restatement which has traditionally been available to all defendants in a defamation action in this and other states.**

> to gather information from policemen or magistrates out of court, about a citizen, and to his detriment, and publish such stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street."

Because the privilege covered fair and accurate reports of public records which are *part* of an official proceeding, there is also a requirement in most jurisdictions that some official action[12] has been taken before the publisher can escape liability. Consequently, a "pleading or a deposition filed in a case but not yet acted upon may not be reported under the claim of privilege." Prosser & Keeton, *supra*, § 115, p 837.[13] Logically, this would also require that more than mere investigative work have been undertaken by a government agency in a criminal case.

There appears to be a split of authority on the question whether a publisher must have actually relied on the public records which are part of an official proceeding, or whether it is adequate that the information published is actually contained in such a record. See, e.g., *Medico* v *Times, Inc*, 643 F2d 134 (CA 3, 1981), and *Bufalino* v *Associated Press*, 692 F2d 266 (CA 2, 1982).

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12 In his opinion, Justice Brickley draws a distinction between an official-proceedings privilege and the Restatement privilege in § 611 which he believes is an "official action" privilege. At common law, some official action was required before a statement could be said to be privileged under the official-proceedings privilege. I do not read the Restatement as describing a different privilege, but, rather, as explaining the common-law prerequisite.

13 Some states have repudiated the "official act" requirement. See, e.g., *Phillips* v *Evening Star*, *supra*.

The best reasoned approach[14] and the one which appears to have been followed most often in Michigan courts, is that actual reliance is not necessary, but that publishers act at their own peril if they rely on anything other than official documents. As Judge Gillis of the Court of Appeals aptly stated in *McCracken* v *Evening News Ass'n*, 3 Mich App 32, 38-39; 141 NW2d 694 (1966):

> "The fact that the reporter herein relied on the word of another as to the nature of the complaint and warrant is immaterial. The statute does not command the reporter to obtain his information from the official court records. At his risk, and at the risk of his publisher, he may rely upon the word of another as to the contents of the complaint and warrant, and that it will be so issued if it has not already been. . . . Obviously, if a warrant is never issued, there are no official proceedings that can be reported and this statute is not applicable."[15]

The statute referred to by Judge Gillis is MCL 600.2911; MSA 27A.2911 which, I believe, contrary to

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14 A commentator in a recent Villanova Law Review article finds an actual reliance requirement will have a "chilling" effect on the media's constitutional rights. In responding to the case of *Bufalino*, *supra*, which had required that the actual source of information be revealed, even if the information was in public records, the article notes:

> **"The result will either be that the protection of the fair and accurate report privilege will be sacrificed, or the willingness of would-be informants to supply publishers with information will be lost." O'Brien, *Torts — defamation — actual reliance on official records is needed for application of fair and accurate report privilege — identification of plaintiff as a public official is needed for application of* New York Times *actual malice standard*, 28 Vill L R 1028, 1048 (1982-1983).**

15 A warrant is not an absolute requirement for the privilege to apply. An arrest by police will also satisfy the official-action requirement.

what Justice Brickley appears to find,[16] is the codification of the common-law official-proceedings privilege in this state.[17]

Section 2911(3), in pertinent part, provides:

> "No damages shall be awarded in any libel action brought against a reporter, editor, publisher, or proprietor of a newspaper for the publication in it of a fair and true report of any public and official proceeding, or for any heading of the report which is a fair and true headnote of the article published."

A parallel statute in New York has been held by the courts of that state to afford more protection than the common-law privilege, rather than less. In discussing the history of the New York official-proceedings law, the New York Court of Appeals noted in *Murray* v *Brancato*, 290 NY 52, 58; 48 NE2d 257 (1943).

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16 **Justice Brickley states in his opinion:**

> **"Broader privileges have included arrests and information given to a law enforcement official.**
>
> *** * ***
>
> **"We think a fair reading of the 'public and official proceedings' language of the instant legislation would dictate that it is intended to cover at least the more limited common-law privilege to report judicial proceedings, but is not by its very language intended to be a 'government action,' 'arrest record,' or 'public records' privilege." Slip op p 9**

All of the cases cited by Justice Brickley as inapposite to the statute involve the application of the common-law "official proceedings" privilege.

17 **Even if Justice Brickley were correct that § 2911 does not afford the same protection as the common-law "official proceedings" privilege, a determination would have to be made as to whether the Legislature intended to preempt the previously available privilege. As I believe the codification parallels the common law, I do not reach this question.**

> "The Legislature of the State of New York by chapter 130 of the Laws of 1854 provided that 'no reporter, editor or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings . . . except upon *actual proof of malice* [emphasis in original] in making such report, which shall in no case be implied from the fact of publication.' This statute, it has been said, was 'simply declaratory of the common-law.' (*Ackerman* v *Jones*, 37 NY Super Ct 42, 54). . . . Then in 1930 by chapter 619 of the laws of 1930 the words 'without proving actual malice in making the report' were omitted and no express qualification of the privilege remained in the statute."

It was further noted in *Farrell* v *New York Evening Post*, 167 Misc 412, 415; 3 NYS2d 1018 (1938), that "[b]y the amendment of 1930 [chapter 619] all publications falling within the purview of the statute are absolutely privileged." See also *Keogh* v *New York Herald Tribune, Inc*, 51 Misc 2d 888; 274 NYS2d 302 (1966).[18]

I would find, then, from the language of § 2911, that the intent of the Legislature in codifying this privilege in 1931, as in New York, was not to change the protection offered at common law, but, rather, to extend it by making this an absolute privilege. This privilege would thus cover a report of an official and public proceeding and any public records which are part of that proceeding.

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18 **New York has since expanded the reach of its statute by entending the protection to "any person, firm or corporation" and by removing the term "public" from its provisions. See NY Civil Rights Law, § 74 (McKinney).**

This construction parallels the suggestion that *Cox* requires absolute immunity for fair and accurate reports of official records and proceedings. See n 10. The Restatement was amended in 1977, after *Cox* was decided, to reflect this view:

> "If the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained, either for defamation or for invasion of privacy." Restatement, *supra*, comment b, § 611, p 298.

It is undisputed that Mr. Rouch was arrested by the Emmett Township Police Department, and it appears to be true that he was later released on bond. Therefore, because libel requires a false statement, there is no cause of action for a report of the arrest, itself, of the charge for which he was arrested or, if true, of the fact that bail was set.

The privilege provided by the statute would only be necessary for *false* statements made in the story. As summary judgment was granted in this case and no factual findings were made on this issue, I am unable to determine on the record before us whether any of the alleged false statements were part of any public-official proceeding or were contained in any official report which was part of such proceeding.[19] If they were, I would find that the defendants are privileged under § 2911, provided that the reporting was a fair and true account of statements made in such proceedings or reports.

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19 As the Restatement, *supra*, comment h, § 611, p 301, notes, an official proceeding in the criminal law context would often begin with an arrest. Any actions or reports made by the police before that time are merely investigative in nature and thus not privileged as part of an official proceeding. As was previously stated, official action is a requirement of the common-law privilege. See Prosser & Keeton, *supra*, § 115, p 836.

As to any statements which are not so privileged, I am in agreement with Justice Brickley that, balancing the plaintiffs' privacy interests with the requirements of the constitution,[20] a negligence standard is appropriate. Further, I agree that in this case the plaintiffs are constitutionally required to prove falsity. *Philadelphia Newspapers* v *Hepps*, 475 US ___; 106 S Ct 1558; 89 L Ed 2d 783 (1986).

I would remand this case to the trial court for further findings consistent with this opinion.

/s/ Patricia J. Boyle
/s/ Dorothy Comstock Riley

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20 For an interesting discussion of this balancing, see Miller, *The William O. Douglas lecture: Press versus privacy*, 16 Gonzaga L R 843 (1981).

JUDGMENT ON DIRECTED VERDICT MOTION

(State of Michigan – Circuit Court – County of Calhoun)

(Dated February 29, 1988)

(DAVID J. ROUCH, Plaintiff, vs ENQUIRER & NEWS OF BATTLE CREEK, MICHIGAN, A Delaware Corporation, Defendant — File No. 80-1263 CZ)

At a session of said Court, held in the Circuit Court-rooms in the City of Battle Creek, Michigan, this 29th day of February, 1988,

PRESENT: HONORABLE STEPHEN B. MILLER, Circuit Judge

Evidence in this case having been presented to a jury and Defendant having moved for a Directed Verdict at the close of Plaintiff's proofs on the issue of punitive and/or exemplary damages and said Motion having been renewed at the conclusion of all proofs and the Court being fully advised in the premises;

IT IS ORDERED that Directed Verdict in favor of Defendant and against Plaintiff be and the same is hereby ordered and adjudged; and

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Plaintiff recover nothing against Defendant on his prayer for punitive and exemplary damages in this case.

/s/ Stephen B. Miller,
Circuit Judge

(*Certification Omitted*)

JUDGMENT

(State of Michigan – Circuit Court – County of Calhoun)

(Dated February 29, 1988)

(DAVID J. ROUCH, Plaintiff, vs ENQUIRER & NEWS OF BATTLE CREEK, a Delaware Corporation, Defendant — File No. 80-1263 CZ)

At a session of said Court, held in the City of Battle Creek, County of Calhoun, Michigan, this 29th day of February, 1988,

PRESENT: HONORABLE STEPHEN B. MILLER, Circuit Judge

This matter having been brought on for Hearing upon Plaintiff's Notice Of Entry Of Judgment and a Jury Trial having been commenced on February 9, 1988, and the Jury having rendered it's verdict on February 19, 1988, and the Court being fully advised in the premises:

IT IS ORDERED that Judgment is hereby entered for Plaintiff and against Defendant in the amount of One Million and no/100ths ($1,000,000.00) Dollars plus costs, interest and attorney fees as allowed by statute.

/s/ Stephen B. Miller,
Circuit Judge

PREPARED BY:
JOHN M. JERECK (P 15495)
ATTORNEY AT LAW
243 CAPITAL AVENUE, NE
BATTLE CREEK, MI 49817

(Certification Omitted)

PROCEEDINGS IN THE CALHOUN COUNTY, MICHIGAN, CIRCUIT COURT, BEFORE STEPHEN B. MILLER, JUDGE, ON APRIL 18, 1988 (RE: DEFENDANT'S MOTIONS FOR JUDGMENT N.O.V. AND FOR NEW TRIAL)

(State of Michigan – Circuit Court – County of Calhoun – File No. 87-412CZ)

* * *

(14) * * * THE COURT: All right. Well, there is a basic disagreement between the parties wherein the Plaintiff is maintaining that publication of the article was an allegation that, in fact, Mr. Rouch committed a rape and that was a false — that was false — he did not, and therefore that the publication, obviously, was the publication of a falsity. And, of course, the Defendant's argument that what was published was that the Defendant — or the criminal defendant, the Plaintiff in this case, was arrested and charged with committing a rape which — the fact of which was a true or accurate (15) statment of what had happened, and, in fact, was not false.

And now you look — that is a good question. I'm not sure how the appellate court will review that. I tend to think that Mr. Jereck has the better of the arguments, quite frankly, on behalf of his client, because of the fact that — I understand the argument Mr. Bernius makes, but, of course, the — the right to publish newsworthy events involving criminal charges is one wherein presumably the charges are not false. Then there is no particular problem. If they turn out to be false, then there is a problem. That is no different than any other defendant — any different problem that a defendant faces in any libel or slander or in general defamation cases, whether it involves a police agency or anybody else.

So somebody came to the newspaper and said A accused B of being a thief and the newspaper publishes

that. They take the risk, of course, that B may not be a thief. If he is, I don't suppose there is a problem. If it turns out that, in fact, the accusation is wrong, and slanderous, the publication of that can result in an action against the newspaper.

And this goes to the very essence of this case (16) — what is the responsibility of a newspaper to determine the accuracy and the truth of its articles, which both sides obviously recognize. And these are great arguments on both sides of the issue, and, as I say, I'm not too sure what the outcome will be, but I suspect that there is more responsibility on the part of a newspaper to take reasonable steps of some kind to ensure that it simply does not publish anything unless that — about someone else, especially when it comes to things which, at least in our law of defamation as it was previously, accusations of crime and things of that nature, including chastity to a woman, and those things that used to be known as slander — and I suppose still are. You have to be careful about that when you publish that kind of a statement. And as I say, I'm really not too sure how that will come out in the appellate courts, but I think probably it — as I say, that the Plaintiff may have the best of the argument.

However, I will be more focused, if you will, on what I think the reasons are for not granting the motion. To grant a motion — the judgment then will be — the claim here is that there was no falsity, or at least material falsity, to the article. I'm not really of a mind to believe that, and I will tell you why. The article did not simply say that Mr. Rouch was arrested, (17) it said that Mr. Rouch was arrested and charged. Now, it is true that that word charged can have a commonly understood meaning, and in many states that may not have been of great consequence, but in Michigan it has some consequences, because felony charges can only be brought

after review by the Prosecuting Attorney actually elected to that office, and/or by a — or, in the alternative, by the indictment of a grand jury, and I'm not too sure that I'm willing to accept the proposition that the general public doesn't understand the difference between an arrest and someone being charged. In Michigan, where it is required in — felony charges have to require authorization of the Prosecutor and/or an indictment by a grand jury, there is a meaning to the word charged which carries the meaning of an authoritative determination of enough evidence to go ahead with judicial proceedings. And that is quite a bit different than the fact that somebody has been, quote: "charged," because the police arrested him, which, of course, you can always argue.

The public, I think, or the average reader, or the ordinary person, can understand, I believe, that someone may be arrested by the police in the heat of the moment, and when circumstances are not entirely clear, then, in fact, there may be no grounds or it may later appear after some investigation that there are no grounds (18) for the arrest or the arrest should not have been made. When there is a review — and, of course, this is the very purpose of the law for having indictments by grand juries and authorization by the Prosecutor — is that when that happens, you have a review that will presumably convince some authority charged with the responsibility of making a decision that there is sufficient evidence to proceed in a court case with the matter.

And that word that was used in the article, I think, much more than those things about whether it was Mr. Rouch's children who were, in fact, not his children — that strikes me as perhaps important but not nearly as important as this word charged. There was certainly a suggestion in that article and use of the word arrested

and charged which was arguably false. There was evidence and testimony on that, as I recall, as to what is meant by charged, in Michigan at least. And as I say, I'm not willing to accept that the public doesn't understand some distinction between those two concepts. In fact, there might be an argument that there was no particular reason to use the words "and charged." The paper could have said arrested for the offense of or the charge of, but the use of the term arrested and charged with, as I say, contemplates some authoritative determination that there was something there by the proper authorities.

(19) Now, that, I think, was false, from all of the other evidence in the case. It was clear from the evidence, I think, that Mr. Rouch was never charged with anything, by anybody who had that responsibility of making that determination that those charges should be brought. He was arrested. In Michigan, that states a different concept than being charged. Now, that is not to mean that the jury had to find that that was a material falsehood, but I certainly think there was evidence in the case from which they could have concluded that there was — there were false things in the article, that being the prime example, and that that was material, and that therefore it could have made the article libelous. And that same reason leads me to conclude that there is nothing about the article that is so clear that the Court would have to find as a matter of law that it was — that there was no possible evidence, no reasonable construction that the jury could put on that article to lead it to conclude there was a material falsehood. I think that's what the article was. It was so clear, as a matter of law, that the Court has to find that there was material falsity in the article. At least I find that to be the case.

(20) And that being my view of the article, of course, I will not grant a judgment of relief based upon that ground.

Okay. Let go on to the next one.

* * *

(23) * * * THE COURT: Let's not skip that far ahead, I'll lose track of what I'm doing. Let me address the issue of fault. There is some good argument to be made by the defense, and arguments obviously about Mr. Mollenhoff and his testimony and his opinion about things, and what it is that the jury should hear and what is proper for them to hear, and the evidence upon which they can make a decision or should not be making a decision, perhaps. It seems to be — and this obviously is a new area of the law where we're all going to learn, I'm sure, from the appellate courts whether we did the right thing or not — that if it is a negligence standard, it's clear that the Plaintiff is required to show fault. Plaintiff has to (24) present some proof that, in fact, the newspaper in this case was negligent.

Now, it's an obvious way to try to prove something like that, to call an expert in the area of, in this case, newspaper reporting and publishing of articles in regards to, specifically, a criminal offense. That you offer their opinion, and once the expert is accepted as an expert, they are allowed under the Michigan Rules of Evidence to express their opinion on that, for whatever weight the jury wishes to give it. Of course, they are instructed as to that, they don't have to accept the expert's opinion. They may disregard it altogether or accept some of it and disregard other parts of it. And, of course, the Defendant has the opportunity to counter the claims of the Plaintiff by presenting its own experts and their opinions as to whether or not the newspaper was negligent or not negligent, and of all of the things that are cited in regard to whether it was reasonable to use a telephone, and so on and so forth.

Those are all good arguments, but what it comes down to on this motion is as to whether or not, as a

matter of law, there was no negligence demonstrated. Whether the Defendant was so lacking that the case should not have been submitted to the jury for their decision. I don't feel that way. I think there was evidence which, (25) if the jury chose to believe it, from which they could reasonably find the newspaper was negligent in the publication of the article. So, I will deny that part of the motion for the judgment.

All right. Mr. Bernius.

MR. BERNIUS: Your Honor, next we once again raise the argument that this article is privileged by reason of the official proceedings privilege. And in that respect, the evidence is much different after this trial than it was before the trial. Namely, with respect to testimony of Magistrate Strong, who was — we indicated in our memorandum, testified that before the newspaper article was published she said bond was evaluated as she was required to do — a number of factors about Mr. Rouch — the criminal case against Mr. Rouch, including the nature of the offense charged, the probability of conviction, and the likely sentence.

And the rationale of the Supreme Court's decision on the official proceedings in this case was that the official proceedings privilege triggers when there is an official action of an adjudicatory nature. And the holding, in this case, is that an arrest without more is not an official action of an adjudicatory nature.

(26) At the trial, of course, the evidence came in which was significantly different than the evidence before the Supreme Court, and Magistrate Strong acted in an adjudicatory capacity, because she acted in that capacity before publication, number one, and number two, because she testified that she took into account the nature of the offenses charged, and the probability of conviction and so on.

It is our position that this newspaper article, which reports upon the setting of bond as well as the charges and so on against the Plaintiff is now — has been proven to be within the scope of the official proceedings privilege. If Magistrate Strong had waited until after publication, that would be different, but she did act before publication. That means that the substance and all of the issues of criminal proceeding against David Rouch were within the privilege.

THE COURT: That one I will answer without the argument because, really, this was brought up during the course of the trial and I answered it at that time. Rightly or wrongly, I made a decision about it and I don't see a reason to change that. As you will recall, I believe I indicated that the action of the magistrate in this case was not — at least in my view — adjudicatory. She wasn't adjudicating anything, she was making a (27) decision about what is called to enter a bond. Certainly, a good argument is that there may have been no authority for the magistrate to be acting at all in that capacity. From the statutory point of view.

So, if that issue was address[*ed*] by the Supreme Court in this case, in its opinion, as I indicated, I didn't see any particular reason to disagree with them, and I don't see any reason to change my prior opinion that was entered during the course of the trial. So I think the answer to this portion of the motion is simply that it has been ruled upon and for the same reasons I did not agree with the Defendant's position at that time, I don't agree with it at this time. So that's sufficient to have my reasons for not granting it on the record.

All right. Now, on to the motion for a new trial.

* * *

(29) * * * THE COURT: Okay. Well, in regard to that issue, we discussed it during the course of the trial and I made a decision about the instructions to be

given to the jury. I may have been wrong — and again, if I was, I'm sure the appellate courts will tell me — but I believe that the clear and convincing standard — the instruction as to clear and convincing standards of proof which I did not give would have been improper, although I certainly had some thoughts about that. And as I say, it may come out on appellate review to be the wrong thing to do.

And I don't disagree with what Mr. Bernius said. There was a discussion of that and an indication that there was no case law that the Defendant could cite, and the Defendant was reserving the right to request that instruction.

Now, there are a couple of other things involved in this motion for new trial that are spelled out in the Defendant's — quite well spelled out in the Defendant's memorandum, and they go mainly to the admission of evidence and requested instructions. I think — at least I believe — that the evidentiary matters were addressed to some extent during the course (30) of the trial, or that the parties had the opportunity to address them or to object at that time, and the Court, of course, made its rulings after the parties' testimony, and I don't — I'm not convinced by anything I've seen in the memorandum that the Court made such a mistake about the evidence. That doesn't mean that I won't be surprised if the appellate courts find that I made a mistake in ruling on evidentiary matters. There were a lot of them, they were involved, as everybody knows who was involved in the case, and they were rather unique and new under the circumstances of this case. And so it may well be that upon review, the appellate court may find error that would justify a new trial, but I don't find anything that convinces me that the Court made any improper evidentiary matters that would rise to the level requiring new trial.

As to the instructions, in retrospect, I probably should have been a little more detailed about my reasons for not giving all of the instructions that were requested, and I'm not sure how much we put on the record at the time. Perhaps we probably could — the more we put on, the better we would have been, I suppose, in that regard. But in general, both parties had a number of requested instructions that they submitted, and in regard to the defense's arguments here, the issue of post-(31)publication evidence on the issue of negligence, that really comes down to an indication of whether the instructions as given by the Court were appropriate and adequately instructed the jury as to what they could consider as evidence, and the purpose of the evidence and why it was admitted.

Basically, my decision, as you will recall at this time — there was a great number of requested instructions by both the Plaintiff and Defendant. If I would have given all of those instructions, it would have served more to confuse the jury than to enlighten them. A lot of them were not appropriate for a number of reasons that we went into for a great length, as I recall it, and the Court's responsibility is not simply to give any instruction that the parties requested, but to give ones that not only accurately state the law but, in fact, clearly stated the law that the jury had to deal with overall in the instructions. And to make the jury instructions logically consistent and something that the jury could understand and work with, and I won't be at all surprised if the appellate courts find that that was wrong also because of the newness of the area and the way in which the law has developed in this particular case.

(32) So we'll have to see, but most of those grounds for new trial go to the evidentiary rulings and pointing out that some instructions were given or were not

given, but a review of these things does not convince me that there was anything which has created any injustice to the parties that would require a new trial.

So we can speak specifically as to each item that was mentioned, I will deny the motion for a new trial based upon any of the grounds cited in the Defendant's memorandum in regard to public interest issue, and the post-publication evidence and issue of negligence, and improper testimony of the Plaintiff's expert, and improper addition of testimony concerning privilege, and improper evidence concerning meaning of the article and its effect on the average reader, and failure to properly instruct the jury as to liability issues, which I believe were all of the headings that were under that part of the motion for new trial.

Okay. I believe we're at point six, against the great weight of the evidence, Mr. Bernius.

MR. BERNIUS: Yes, points six and seven, Your Honor, basically are — make similar arguments. They address the damages awarded in this case, which is unconscionable.

* * *

(39) * * * THE COURT: All right. Well, I'm not going to change the verdict of the jury. I generally agree with the argument of the Plaintiff that there was evidence from which the jury could return a substantial verdict should they believe the evidence, and they obviously returned a substantial verdict. Of course, the Court is not taking into account the fact there there is a great deal of interest on this verdict, because of the age of the case, the history of it. But looking solely at the verdict returned by the jury, and based upon, quite frankly, the argument that Mr. Jereck has put forth, the (40) — it is very difficult to — if not impossible to — put a monetary figure on one's reputation, which does take a

lifetime, ordinarily, to establish and certainly can be destroyed quite quickly by the defamation, especially the nature of this one. And in this case, the counsel for both sides had opportunity to present their evidence and argue them well, as both of you did, as to whether it was appropriate, and the jury apparently felt that verdict was appropriate.

The only issue as I see it, as far as the Court's review of that, is whether or not there are any grounds for a new trial because the jury's verdict was influenced by passion or prejudice, and I — Mr. Jereck certainly gave an impassioned closing, but so did Mr. Bernius. So I don't find anything in the record or my memory of the trial that would indicate that the jury verdict was based upon passion or prejudice, or inappropriate for some reason of that nature. And while it was a large verdict, a substantial verdict, I can't honestly say that I would find the verdict untoward, based upon the nature of the evidence presented — and again, it's not the Court's construction of the evidence or what should be concluded from that, but whether the jury reasonably can conclude and properly reach such a verdict based upon the evidence. It may have not been (41) what my verdict may have been or somebody else, but it was the jury's verdict and I don't think it should be disturbed, barring some clear showing that it was unsupported by the evidence.

So addressing both the question of the motion for a new trial and the issue of the remittitur, I will deny those motions, along with the others that we've had up to this point brought by the Defendant.

Now, there is an additional part of that involving the entry of a judgment based upon the verdict in excess of the addendum clause without an amendment by the Plaintiff. I don't find that to be a grounds to set aside the judgment or the verdict, and for the reasons — well,

there are a number of appellate cases which I believe the parties have cited in their memorandum and my conclusion is that it's not required and not fatal to the entry of the judgment that the formal motion to amend the addendum clause was not brought by the Plaintiff, which admittedly it wasn't. I would not set aside the verdict for that reason.

Which gets us down, I believe, to the question of a stay of execution of the judgment and the question of bond. I guess we should address that.

* * *

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND/OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL

(State of Michigan – Circuit Court – County of Calhoun)

(Dated April 28, 1988)

(DAVID J. ROUCH, Plaintiff, v ENQUIRER & NEWS OF BATTLE CREEK, MICHIGAN, A Delaware Corporation, Defendant — File No. 80-1263 CZ, No. 87-412 CZ)

At a session of said Court, held in the Circuit Courtrooms in the City of Marshall, Michigan, this 28th day of April, 1988,

PRESENT: HONORABLE STEPHEN B. MILLER,
Circuit Judge

This matter having come on to be heard on the Motion of Defendant for Judgment Notwithstanding Verdict and in the Alternative for a New Trial and further in the Alternative for Remittitur and the Court having heard the arguments of counsel in open court, said arguments having been presented in accordance with previously filed memoranda submitted by the respective parties hereto, and the Court having dictated its findings on the record,

IT IS ORDERED that Defendant's Motion for Judgment Notwithstanding Verdict and Motion for New Trial

and Motion for Remittitur be and the same are hereby denied.

/s/ Stephen B. Miller

Submitted by: John M. Jereck (P 15495)
Attorney for Plaintiff

Waived Notice of Entry and
Approved as to Form:
/s/ James M. Sullivan (P 21143)
Attorney for Defendant

(Certification Omitted)

OPINION [*AFTER REMAND*]

(State of Michigan — Court of Appeals)

(Filed June 4, 1990)

(DAVID J. ROUCH, Plaintiff-Appellee, v ENQUIRER AND NEWS OF BATTLE CREEK MICHIGAN, Defendant-Appellant — No. 108595)

Before: Murphy, P.J., and Neff and G. S. Allen, Jr.,* JJ.

NEFF, J.

In this libel action, based on a news report of plaintiff's arrest published by defendant newspaper on December 22, 1979, defendant appeals by right from a jury verdict awarding plaintiff $1,000,000. We affirm.

I

The underlying facts are not in dispute. At the time of publication plaintiff was a single, forty-three-year-old man residing with his two children, Tony and Nick, at 631 Golden Avenue in Battle Creek. He had lived there for some thirteen years and had been employed at Post Cereals–General Foods for some twenty-three years.

On December 20, 1979, plaintiff met his ex-wife, Shannon Mayo, at a lounge after work. After having some drinks, plaintiff and Mayo went to Mayo's home to feed her children, ages nine and eleven, and to arrange for a baby-sitter. While Mayo changed her clothes, plaintiff picked up the baby-sitter and returned to Mayo's home. They went out for the evening, ending up at the lounge where they had met after work. After staying at the lounge until 2:30 a.m., December 21, 1979, they went

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*** Former Court of Appeals judge, sitting on the Court of Appeals by assignment.**

to plaintiff's home on Golden Avenue where plaintiff's son Nick was sleeping on the couch. After talking a short while they went to bed.

Sometime later, plaintiff was awakened by Nick who said that the police were at the door. The police officers told plaintiff that they had come to pick him up on a sexual charge of some sort. Plaintiff informed the officers they had the wrong person and, if they would go inside and talk with the lady that he was with, she would tell them that it was not he. The officers refused to do so and took plaintiff to the Bedford Township police department.

There plaintiff repeated the story he had told the police officers. Plaintiff was removed to the county jail at about 6:30 a.m., Friday, December 21, 1979, but, about 2:00 p.m., he was released on a personal recognizance bond, on the condition that he appear for arraignment on December 28, 1979. When plaintiff appeared for arraignment, he was told by the court clerk that charges had not been filed and he was free to go. A formal warrant was never issued and, several months later, another person was charged with the offense.

Page B-5 of the December 22, 1979, morning edition of the *Enquirer and News of Battle Creek* carried the following news article:

> A 43-year-old man has been arrested and charged with the sexual assault of a 17-year-old women [sic] who was baby-sitting with his children at his ex-sife's house on North Finlay Avenue in Bedford Township.
>
> The suspect has been identified by Bedford Township police as David J. Rouch of 631 Golden Ave. He is free on a $10,000 personal recognizance interim bond pending his arraignment in

> District 10 Court next week. Rouch is charged with first-degree criminal sexual conduct.
>
> Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said.
>
> The victim later called a relative, who took her to Community Hospital and then called police. The suspect was identified by his children, according to police.
>
> Rouch was arrested at his home by Emmett Township police, who were informed where he lived by Bedford Township investigators.
>
> The charge against Rouch was authorized Friday by the Calhoun County Prosecutor's office.

Stan Kaufman, ten-year veteran police beat reporter for the *Enquirer*, typed the story after receiving the information by telephone from Bedford Township police. It is Kaufman's practice to make the rounds of the area police departments each day either in person or by telephone.

On November 26, 1980, eleven months following publication, plaintiff for the first time contacted the *Enquirer* and demanded a retraction within ten days. On December 3, 1980, a retraction was published. On December 5, 1980, plaintiff filed suit alleging that the article concerning plaintiff's arrest was false and defamatory.

II

On June 14, 1982, the Calhoun Circuit Court granted the *Enquirer*'s motion for summary disposition on the ground that a report of an arrest is of general public

interest which entitles a newspaper to a qualified privilege. Plaintiff appealed to this Court. In *Rouch* v *Enquirer & News of Battle Creek, Mich*, 137 Mich App 39, 47; 357 NW2d 794 (1984), this Court reversed and held that the statutory qualified privilege contained in MCL 600.2911(3); MSA 27A.2911(3) was inapplicable because no warrant was issued and there were no official proceedings.

Defendant appealed to our Supreme Court. In *Rouch* v *Enquirer & News of Battle creek*, 427 Mich 157, 167; 398 NW2d 245 (1986), the Supreme Court agreed with the Court of Appeals that the statute does not apply, but reached that conclusion through a different analysis. The Supreme Court reasoned that an arrest that amounts to no more than an apprehension is not a "proceeding" under the statute. 427 Mich 172-173. Accordingly, the Court concluded that the information which was orally furnished Kaufman did not enjoy the privilege afforded by the "public and official proceedings" statute.

The Supreme Court also adopted the *Gertz* v *Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974), negligence standard and held that plaintiff was not required to show malice on the part of defendant. 427 Mich 202-203. Instead, the Court held that a report of an arrest and the facts used to establish the probable cause for that arrest amount to speech of a public concern and that the rule of *Philadelphia Newspapers, Inc* v *Hepps*, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986) applies. 427 Mich 206. In so holding, the Court stated:

> Because of the importance of this type of information in a free society, plaintiffs who choose to bring actions in libel on the basis of such reports must first prove that the state-

> ments were false in addition to proving that defendants were negligent in so reporting. [427 Mich 206.]

The case was remanded to the trial court for proceedings consistent with our Supreme Court's opinion.

III

A

On February 9, 1988, an eight-day trial commenced in circuit court. Plaintiff, his former wife, and his two sons testified to the events occurring on the afternoon and early morning of December 20 and 21, as set forth above.

Plaintiff's expert witness, Clark Mollenhoff, professor of journalism at Washington University, testified over objection that Kaufman was negligent because he did not get the other side of the story. He observed that police evidence is often drawn from irresponsible sources and that good journalism at least requires some follow-up checking on the accuracy of the police report. He stated that there was no time pressure in the instant case and there was time for Kaufman to contact Rouch or other witnesses, including Mayo. He testified that Kaufman was also negligent because he did not attend seminars to learn the methods and standards of investigative reporting. In addition, he testified that the newspaper itself was negligent because the editor approved what Kaufman had written without any substantive changes at all. Mollenhoff also found the "retraction" by the *Enquirer* insufficient. According to Mollenhoff, the purpose of a retraction is to give notice to the public that there was nothing to the first story that was printed. Instead, the "retraction" merely said that the decision not to prosecute was based on insufficient proof, which could indicate that there was some

evidence against Rouch. When asked how the article impacted on the average reader, he replied that the *Enquirer*'s use of the word "allegedly" did not sufficiently detract the reader from the fact that the statements made by the police were false. According to Mollenhoff, the average reader would conclude that Rouch committed the brutal rape and that his children absolutely identified him as the person involved.

At the conclusion of Mollenhoff's testimony, defense counsel cross-examined plaintiff who testified that he made no effort to get in touch with the *Enquirer* after seeing the article, but did sue the township for false arrest and settled out of court. He explained that he hoped the matter would die down but, when it did not, he filed suit. He conceded that he suffered no loss of wages and incurred no medical expense or lost fringe benefits or loss of promotion because of the article.

Mayo and plaintiff's two sons testified at trial regarding the events transpiring the night plaintiff was arrested, and some eight friends and coworkers testified as to the effect the printed article had upon them.

Defendant's motion for a directed verdict was denied in all respects but one. The court held that, because plaintiff had not established actual malice, punitive and exemplary damages would not be allowed.

B

The first defense witness to testify was Kaufman. He testified that it was his usual procedure to make the police department rounds in person, but, after 8:00 a.m., he made his contacts by telephone. Kaufman stated that he came upon the Rouch story when the Bedford Township police told him a man had been arrested and gave him some particulars of the incident. Kaufman also stated that it was decided that the story

would not be used for the Friday, December 21st, edition of the paper, and he did not get the entire story until the afternoon of December 21st. Kaufman called the prosecutor's office and was told that the suspect had been arrested and that Bedford Township police had the story. According to Kaufman, that afternoon he received a telephone call from either Sergeant Minier or Chief Bell of the Bedford Township Police Department and was told that the suspect had been in court and was released on bond. Kaufman further stated that, after that telephone call, he wrote the story and went home.

Kaufman testified that he made no attempt to get in touch with Rouch, but that he had no reason to question the information that he received from the police. Kaufman was not aware of the police policy about the release of a suspect's name. According to Kaufman, the police usually will give the name out, but ask that it be held until they get more information or until the suspect "goes to court."

On redirect examination, Kaufman testified that the police requested that he not use Rouch's name until they contacted him. He also testified that, when the police contacted him, they told him that the prosecutor was involved and that the name could be used.

When asked if he felt he had any obligation to find out whether the police had told him the truth, Kaufman replied that, if a police officer gives you information, it is safe to conclude that it is correct. Kaufman further stated that, because he had such a good working relationship with the police, he had no reason to question the information and relied upon the honesty of Chief Bell and Sergeant Minier. Kaufman conceded that he had never been sent to any seminars on investigative reporting and explained that his knowledge of investiga-

tive journalism was based on his thirty-four years of experience as a reporter.

Kaufman also stated that, as of the date of the article, he did not know another suspect had been picked up and did not know the state police were involved in the matter. When asked if he knew that plaintiff had assaulted the baby-sitter, Kaufman replied that he did not know but that he was only reporting what the police had told him.

Testifying next was William Giles, chair of the school of journalism at Louisiana State University and editor of *The Detroit News* from 1977 through 1983. Giles testified that Kaufman's conduct met the ordinary standards of journalism and that reporter Kaufman's article was straightforward, contained no speculation, and was not jazzed up. He opined that Kaufman handled the story properly and that, based on his experience, he would accept a police officer's report of what transpired.

Next to testify was Daniel Martin, who in 1979, was managing editor of the *Enquirer*. Martin testified that Kaufman was anything but incompetent, had won numerous awards over the years and had often helped break in new reporters.

John Bell, police chief of Bedford Township at the time of publication, testified by deposition that he had not given information to Kaufman about the assault because it was the township's policy not to release information about a suspect until after arraignment. However, on cross-examination, he admitted that in his capacity as police chief, he had talked with Kaufman on several occasions about police activities. Bell also stated that plaintiff's $10,000 bond may have been handled over the telephone by Magistrate Betty Strong.

Defendant's final witness was Roy Fischer, director of the graduate program of the University of Missouri's School of Journalism. Fischer's testimony was consistent with that of William Giles.

C

In rebuttal, plaintiff called Magistrate Strong who testified that she had set bond for plaintiff but that the proceedings were by telephone and not in court. The sheriff's department had called and asked her to set a bond of $10,000. She stated that, when setting bond, among other things, she takes into account the nature of the offense and the probability of conviction.

D

At the close of Magistrate Strong's testimony, defendant renewed its motion for a directed verdict, incorporating all prior arguments and also asserting that the disputed article was protected from suit by the "official proceedings privilege" statute, MCL 600.2911(3); MSA 27A.2911(3). Following extensive arguments, the trial court took the motion under advisement but, on the following day, ruled that the "official proceedings privilege" did not apply[1] and again ruled that, because plaintiff had failed to demonstrate malice, the jury would not be instructed as to exemplary or punitive damages.

After instructing the jury, the court inquired whether the parties had any additional objections, and neither party raised any objections.

The jury returned a verdict in favor of plaintiff and awarded damages of $1,000,000. Defendant's motion for judgment notwithstanding the verdict was denied in all

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[1] **The Supreme Court opinion in *Rouch* clearly required this result. 427 Mich 164-173.**

respects, but a stay was granted pending appeal. Defendant appeals by right raising seven grounds for reversal.

IV

A

The first issue raised on appeal is whether plaintiff's proofs met the test laid down by our Supreme Court in its earlier opinion in this case, i.e., whether the statements in the *Enquirer* article were false. Our dissenting colleague, citing the earlier Court of Appeals opinion in this case and *Fisher* v *Detroit Free Press, Inc*, 158 Mich App 409, 413; 404 NW2d 765 (1987), lv den 428 Mich 914 (1987), finds that, not only must the disputed statements be proven false, they must be false in a material aspect. Under this analysis, if the gist, or sting, of the article is substantially true, the falsity test is not met. The earlier Supreme Court opinion in this case specifically rejected this approach: "[W]e decline to distinguish, as did the Court of Appeals, the essence of the article from its supporting facts or details." 427 Mich 204.

The dissent goes on to say that whether an article is substantially true is a legal question, again citing the earlier Court of Appeals opinion in this case, 137 Mich App 39, 43, n 2. The Supreme Court opinion does not speak to this issue.

B

We hold that, whether the article is read for its gist or simply for the information presented as fact, plaintiff has met his burden of proving falsity.

C

Reduced to its essence, the article says that plaintiff was charged with the crime of first-degree criminal

sexual conduct, sexual assault, and that his children identified him as the person who committed the crime. Neither of those assertions was true. Plaintiff was never "charged" with any crime, and the identification was by his former wife's children, not his own.

In the Supreme Court opinion in this case, the majority opinion notes:

> Although he was arrested, plaintiff in fact was never formally charged with the crime, and ultimately, someone else was. The Calhoun County Prosecutor's Office had apparently refused to issue a warrant after plaintiff's arrest. [427 Mich 160.]

The Court of Appeals reached the same conclusion: "Although plaintiff was arrested for the crime, he was never charged." 137 Mich App 43.

The article refers to "charges" against plaintiff three times in its brief six paragraphs. In the first paragraph it says that "A 43-year-old man has been arrested and charged with the sexual assault of a 17-year-old women [sic] . . . ." The second paragraph identifies plaintiff by name as the person arrested, and it says "Rouch is charged with first-degree criminal sexual conduct." Finally, the last paragraph says "The charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office." Unfortunately, in this case, the message told to the readers of the *Enquirer* article was not true because, as noted by our Supreme Court, plaintiff was never charged.

The dissent in this case says that the common usage of the word "charge" means "accuse" and that plaintiff was accused of the assault and so the article was not false. There are problems with this line of reasoning. First, it flies in the face of the holding of our Supreme

Court in its earlier opinion in this case. Second, we do not agree that the commonly understood meaning of the word "charge" is merely to accuse. *Webster's New World Dictionary of the American Language* includes "accuse" in its definition of "charge," but it also includes the term "indictment," a word of far more serious import and implications. Indeed, "indictment" implies a formal *criminal* accusation. *The Random House College Dictionary* (Revised ed) defines charge as "11. to accuse *formally* or explicitly" and as "31. an accusation." (Emphasis added.)

Even if we were to accept the proposition that the common usage of the term "charge" relates only to an accusation, the article, as written, and particularly the last paragraph, certainly uses the term in a much more specific and legal sense. In denying defendant's post-trial motions, the trial judge came to the same conclusion regarding the commonly understood meaning of the word "charge" as well as the use of the term in the article in question. In his opinion from the bench, the trial judge noted that, in Michigan, the use of the word "charge," has great consequences because a felony charge can be brought only after review by the prosecuting attorney, duly elected to that office, or on indictment by a grand jury. He went on to find that the word "charged" carries the meaning "of an authoritative determination of enough evidence to go ahead with judicial proceedings." He commented that the evidence and testimony in this case established this use and definition of the word "charge" and that the use of that word in the article published by defendant "contemplates some authoritative determination that there was something there by the proper authorities." He then went on to find that, from all the evidence in the case, the claim that plaintiff had been charged was false, and,

from that, the jury could reasonably conclude that the article was false.

The plain language *and* clear implication of the *Enquirer* article are that there was more than a simple accusation against plaintiff. The article says twice that plaintiff was charged with a sex crime, and the final paragraph says that the prosecutor's office authorized the charge. The prosecutor, as is commonly known and as noted by the trial judge, does not just accuse; the prosecutor authorizes formal criminal proceedings, and that is exactly what the article says happened. There can be no doubt that both the details as reported and the gist of the article say that plaintiff was formally charged with a serious crime, not that there was merely an accusation of wrongdoing.

This understanding of the use of the word "charge" is borne out by the retraction printed by defendant. The retraction starts with the following paragraph:

> An Emmett Township man, accused last December of sexually assaulting a young woman, *was never formally charged in the case* and police later arrested another man who is being prosecuted for the crime. [Emphasis added.]

Perhaps it was this language which led the earlier Court of Appeals panel to conclude: "The parties agree that the underlying facts behind the story are substantially false . . . ." 137 Mich App 42-43. Perhaps this language also led Justice Cavanagh to opine that the issue of falsity was not before our Supreme Court in its earlier review of this case because it was "fairly clear that the article contained false information." 427 Mich 207. In fact, Justice Cavanagh viewed the retraction as a virtual admission of falsity.

The final problem with the line of reasoning employed by the dissent arises out of our Supreme Court's majority opinion in this case. In ruling that the "official proceedings privilege" statute, MCL 600.2911(3); MSA 27A.2911(3), does not apply to an arrest, the Court said: "We conclude that an arrest that amounts to no more than an apprehension is not a 'proceeding' under the statute." 427 Mich 172-173. Likewise, we conclude that a mere arrest that is no more than an apprehension is not a "charge" for purposes of determining whether the article in question here was false.

Further weight is added to the article by inclusion of the inaccurate information that plaintiff was identified by his own children. To say that a person's own children identified him as the perpetrator of a serious crime lends credibility to what is reported and would seem to eliminate the possibility that there might have been a mistaken identification.

Accordingly, we hold that plaintiff met the burden of proving falsity, and we affirm the finding of the trial judge that plaintiff had proven falsity as a matter of law.

V

The second issue raised on appeal is whether plaintiff submitted sufficient evidence to establish defendant's negligence.

A challenge to the sufficiency of the evidence requires that we view the evidence in the light most favorable to the plaintiff and that we give the plaintiff the benefit of every reasonable inference which can be drawn from the evidence. If, after reviewing the evidence, reasonable jurors could differ, the issue is properly left to the trier of fact. *Boggerty* v *Wilson*, 160 Mich App 514, 522; 408 NW2d 809 (1987), lv den 430 Mich 851

(1988). We find that there was ample justification to submit the negligence question to the jury.

Plaintiff's expert witness, a professor of journalism, testified that defendant's reporter was negligent in at least two particulars: first, in not getting the other side of the story after talking to the police, and, second, in failing to attend seminars about investigative reporting. The expert also testified that the newspaper was negligent because the editors should have corrected the reporter's work or should not have published it and because it published an inadequate retraction.

The testimony of plaintiff's expert was more than enough to raise a question of fact for jury consideration as to the negligence of the reporter and the newspaper.

VI

Defendant next argues that the article is privileged under the "official proceedings" statute, MCL 600.2911(3); MSA 27A.2911(3). This issue was raised and was soundly rejected by our Supreme Court in its review of this case:

> We conclude that an arrest that amounts to no more than an apprehension is not a "proceeding" under the statute. Accordingly, the information orally furnished to the defendant in support of it does not, as such, enjoy the privilege afforded by the "public and official proceedings" statute. [427 Mich 172-173.]

The Court reached this conclusion after noting that "the publication of *judicial proceedings taken before magistrates* is privileged to the same extent as the proceedings of the trial court." 427 Mich 164; emphasis added. Seizing upon this observation, defendant argues that, in the eight-day trial in the instant case, unlike the

truncated record on summary disposition before our Supreme Court in its review of this case, the record discloses that Magistrate Strong acted in a judicial capacity when she released plaintiff on bond. The magistrate testified that, before setting bond, she evaluated the nature of the offense charged, the probability of conviction, and the likely sentence.

MCL 600.2911(3); MSA 27A.2911(3) provides:

> No damages shall be awarded in any libel action brought against a reporter, editor, publisher, or proprietor of a newspaper for the publication in it of a fair and true report of any public and official proceeding, or for any hearing of the report which is a fair and true headnote of the article published.

We do not believe that the brief participation of Magistrate Strong in setting bond brings this matter within the "official proceedings" statute. When asked if, upon setting bond in this case, she did so as a magistrate, Magistrate Strong responded she could not recall this particular bond and that perhaps one of the sheriff's department officers provided her with some information, and she probably talked to the arresting officer by telephone. But, assuming *arguendo*, that, in setting bond, the magistrate was acting in a judicial capacity, nothing in the record indicates the article in question was the product of the informal proceedings before the magistrate. Therefore, we find no error.

VII

On appeal, defendant argues that the trial court, over repeated objections, improperly permitted plaintiff's expert witness, Clark Mollenhoff, to voice his opinion on three ultimate issues of law which, under *People* v *Doan*, 141 Mich App 209; 366 NW2d 593 (1985), and *In re*

Powers Estate, 375 Mich 150, 172; 134 NW2d 148 (1965), are issues which properly should be decided by the jury. These ultimate issues of law are:

(1) That defendant engaged in a "pattern of negligence" and that defendant was "grossly negligent";

(2) That the article was not "privileged" and what the police told the defendant was "not privileged in any respect"; and

(3) That the article was "libelous."

We find the Mollenhoff's testimony admissible under MRE 702 and MRE 704. MRE 702 provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

MRE 704 provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

A trial court in its discretion may admit expert opinion testimony where it determines that the witness is qualified as an expert in his field, where there are facts which require an expert's interpretation or analysis, and where the witness' knowledge is of particular value to the jury. *Keefer* v *CR Bard, Inc*, 110 Mich App 563, 570; 313 NW2d 551 (1981). A trial court's determination that a witness qualifies as an expert will not be reversed absent an abuse of discretion. *Evans* v *Van*

Kleek, 110 Mich App 798, 805; 314 NW2d 486 (1981). When an expert's conclusions are drawn from facts on the record and depend on professional knowledge or skill, the conclusion may be admissible even if it embraces the ultimate issue or issues to be decided by the trier of fact. *Ruddock* v *Lodise*, 413 Mich 499, 503-504; 320 NW2d 663 (1982). Where a trial court determines that expert testimony will assist the trier of fact in understanding the evidence or determining a fact in issue, the expert may testify in the form of an opinion even where the testimony embraces the ultimate issue to be decided. See *Independence Twp* v *Skibowski*, 136 Mich App 178, 186; 355 NW23d 903 (1984).

Mollenhoff testified as an expert in journalism. He is also an attorney. As an expert witness, he was permitted by MRE 702 to testify in the form of an opinion as to defendant's negligence, the article's status as privileged, and the article's status as libelous. Although he used the terms "negligence," "privilege," and "libelous," at no point did he purport to define those terms. Instead, the record shows that he always spoke in the form of an opinion after having first given a factual foundation for the ultimate issue to be decided. Accordingly, we find the trial court properly allowed the testimony in evidence.

VIII

In arriving at his conclusion that the *Enquirer* was negligent, Mollenhoff referred to several post-publication events. He stated that reporters have an obligation to go back several days later and follow-up on a story and that the newspaper's subsequent retraction was incomplete and unsatisfactory. According to defendant, it is error to find a defendant negligent based upon events and activities taking place after publication.

Gertz v *Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

An examination of the transcript discloses that, prior to making reference to post-publication events, Mollenhoff had testified that certain prepublication practices, procedures, and safeguards should have been employed by the reporter, the editor, and the company itself. Because these had not been employed, Mollenhoff concluded that defendant was negligent. Much, though not all, of the post-publication testimony was brought on by defendant's cross-examination of the witness. Also, Mollenhoff stated that information subsequently discovered by the police did not form the basis of his opinion. Therefore, we find no error in admission of the post-publication testimony.

Likewise, we find no error in the admission into evidence of Mollenhoff's testimony regarding the article's effect upon the average reader. A decision whether evidence is relevant is left to the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. *Kirk* v *Ford Motor Co*, 147 Mich App 337, 343; 383 NW2d 193 (1985). Mollenhoff's testimony was well within the parameters of MRE 702 and 704. Moreover, as noted earlier, eight of plaintiff's friends testified as to the effect of the article on them. Thus, even if the expert's testimony in this respect were inadmissible, the error was harmless. We find no abuse of discretion.

IX

Defendant next alleges error arising out of the admission of certain exhibits and testimony regarding other exhibits.

Plaintiff's exhibit five was a handwritten note to Plaintiff from a lady friend named Delores in Ford Wayne to which was attached a clipping from *The Detroit News*

regarding a libel suit against the *News*. The article made a passing reference to a suit against the *Enquirer* "by a man who was arrested, but not prosecuted, for the rape of his stepchidren's baby-sitter." After making a special record outside the presence of the jury, the trial judge admitted the exhibit as a republication which was a natural and probable consequence of the initial publication and also for the purpose of showing aggravation of damages. Plaintiff's testimony in the presence of the jury regarding the article was very brief.

We hold that the trial court's initial ruling that the article was so far removed from the original publication that its admission would only be confusing was correct. However, we are unpersuaded that the fleeting reference to the original publication without mention of plaintiff's name was prejudicial. Plaintiff testified that Delores knew of the incident and the original publication prior to reading about it in *The Detroit News* clipping.

Plaintiff's exhibit nine is the first page of an article appearing in the *Detroit Free Press* on December 9, 1988. It is entitled "News media going to war over libel suit ruling in rape arrest." It recites the facts in this case and the holding of the earlier panel of the Court of Appeals. After first ruling that the exhibit was admissible, the trial court reversed itself and only allowed oral testimony regarding the article.

Generally, the author or publisher of a defamatory statement incurs no liability, either as a distinct cause of action or by way of enhancing the damages of the original defamation, for a voluntary and unauthorized repetition or republication of the defamatory matter by others who act independently. Anno: *Liability of publisher of defamatory statement for its repetition or republication by others*, 96 ALR 2d 373. The reason underlying the general rule is that such repetition cannot be con-

sidered the natural and probable result of making a defamatory statement. 96 ALR 2d 376.

Exhibit nine is basically a repetition of the facts contained in the original article. It also concerns the ruling of the earlier Court of Appeals panel in this case. The "official proceedings" statute provides that no damage shall be awarded in a libel action for publication of a true and accurate report of any court proceedings. Under both the statute and the rule that a publisher is not liable for unauthorized republication by others, testimony regarding exhibit nine should not have been admitted. Nevertheless, in view of the extensive testimony already admitted regarding the arrest and the article, we find the error insignificant and harmless.

Defendant also claims it was error to allow the testimony of Battle Creek public librarian Helen Emerson relative to the contents of a series of news articles contained in folders marked exhibits ten and eleven. These articles consisted of news stories in the *Enquirer* pertaining to proceedings in the Court of Appeals and the Michigan Supreme Court regarding the instant case. The trial court did not allow Emerson to orally state to what each article related. Emerson also testified that the articles were put on microfilm and that finding the articles would be very difficult because one would need the date. She stated that, although many people use the microfilm machine at the library, no one had requested these articles.

Emerson's testimony almost exclusively pertained to news stories relating to judicial proceedings as published by the *Enquirer*. As stated earlier, these articles relating to judicial proceedings are privileged under the "official proceedings" statute. Therefore, Emerson's testimony should not have been admitted. However, given the extensive testimony previously given by plaintiff's

witnesses as to the impact of the original article, we find the error harmless.

X

Defendant's next claim is that the trial court erred when it failed to give five of defendant's requested jury instructions. Plaintiff argues that defendant failed to object on the record as required by MCR 2.516(C). Although the record does disclose that defendant's counsel did not object at the conclusion of the court's instructions, the record specifically shows that, prior to giving its instructions, the court and counsel spent some five or six hours together in chambers going over the instructions. At the conclusion of the in-chambers conference, the court observed that, because each instruction had been thoroughly discussed in chambers, both parties would be "adequately protected by putting their requests in evidence." Defendant's counsel then offered defendant's exhibit H, which contained all of defendant's requested instructions, and the exhibit was received. Thus, we find defendant fully complied with MCR 2.516(C).

As to the merits of the instructions which the trial court rejected, we find as follows:

(1) *Official Proceedings:* Because the "official proceedings privilege" does not apply, the trial court properly refused to give this instruction.

(2) *Clear and Convincing Evidence*: This proposed instruction is based on Ohio law (*Lansdowne* v *Beacon Journal Publishing Co*, 512 NE2d 979; [Ohio, 1987]), which adopted the "clear and convincing" standard rejected by the Supreme Court in its earlier review of this case. The trial court properly refused to give this instruction.

(3-4) *Material Falsity:* Although the trial court did instruct that plaintiff must prove the article "materially false," the court did not explain the meaning of "materiality." Given the problem in the published article regarding the words "charge" and "identified by his children," we believe a clarifying instruction would have been helpful. However, we find the instructions offered by defendant too long and too repetitive. Therefore, we find the trial court properly refused to give these instructions.

(5) *Rumor:* Given the absence of proof of a general rumor, this instruction was properly rejected by the court.

XI

The last issue raised by defendant is that of remittitur. Defendant argues that the proofs do not support the verdict of the jury as to damages and that we are obligated to reduce that verdict "to a minimum."

A

We first note that defendant did not present any testimony, witnesses, or evidence on the issue of damages. Closing argument of defense counsel covers twenty-two pages of trial transcript, with only two paragraphs (twenty-five lines), devoted to damages. In fact, counsel argued "I am confident that you [members of the jury] are not going to have to take into account or decide an amount of damages and I won't discuss damages at length." He went on to say that the request for a damage award by plaintiff's counsel was "absurd" and that the jury was not bound to even consider the figures suggested by plaintiff's counsel as the proper measure of damages. Therefore, the evidence and argument of plaintiff as to damages were essentially unrebutted.

B

In denying the motion for remittitur, the trial judge found that "there was evidence from which the jury could return a substantial verdict should they believe the evidence . . . ." He went on to note that it is difficult, if not impossible, to put a money value on reputation, "which does take a lifetime, ordinarily, to establish and certainly can be destroyed quite quickly by the defamation, especially the nature of this one."

In considering the motion, the judge acknowledged that both lawyers had taken the opportunity to argue strongly to the jury. However, he held that there was absolutely nothing which would suggest that the jury's verdict was influenced by passion or prejudice. He concluded by finding that the verdict was supported by the evidence.

C

We are constrained to agree with the trial judge who presided over eight days of trial in this case. Based on the record before us, we are unwilling to invade the province of the jury in calculating damages.

The most recent decision of our Supreme Court on this issue is *Palenkas* v *Beaumont Hospital*, 432 Mich 527; 443 NW2d 354 (1989). In *Palenkas* our Supreme Court established the standard by which a trial court must judge a motion for remittitur. Under that standard, the court must consider:

> 2) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption or mistake of law or fact;
>
> 3) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained;

> 4) whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions. [432 Mich 532.]

In *Palenkas*, the Court rejected the subjective "shock the conscience" test which had been used to apply the remittitur rule of MCR 2.611(E)(1). The new standard is meant to provide a more objective evaluation of the jury's damage award by the trial judge.

Although the trial court in this case did not have the benefit of the *Palenkas* opinion when he decided the merits of the remittitur motion, his opinion almost seems to reflect prescience of it. As noted above, he found expressly that the jury verdict was not the result of any improper influence and that there was sufficient evidence of injury for which responsible minds could award a substantial amount as just compensation. In addition, the award quite clearly did not shock his judicial conscience.

On the record before us, we can find no abuse of discretion by the trial judge in reaching the decision to deny the motion for remittitur. 432 Mich 533; *Hines* v *Grand Trunk WR Co*, 151 Mich App 585, 595; 391 NW2d 750 (1985); *Jenkins* v *Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 798; 369 NW2d 223 (1985).

D

In its earlier review of this case, our Supreme Court recognized that the defamation action plays an important role in our free society. The Court quoted with approval from *Seegmiller* v *KSL, Inc*, 626 P2d 968, 973 (Utah, 1981):

> [W]e recognize that the integrity of an individual's reputation is essential to his standing in

> society, in his vocation, and even in his family. *It may indeed be indispensable to one's sense of self-worth. The dignity of virtually every human being depends in part upon his right to be known as the person he truly is. For centuries it has been recognized that an assault upon a person's character may be far more damaging and long-lasting than an assault on his person.* Indeed, freedom from false attacks on one's personality may be viewed as at least as essential to ordered liberty as freedom from physical abuse." [427 Mich 194; emphasis added.]

There was testimony about damage to plaintiff's reputation as it related to his friends, family, and coworkers. Plaintiff testified about the effect the article had on his activities, how it made him feel and how it affected his children. As noted, the evidence as to damages was unrebutted. Defense counsel took a calculated risk in presenting his client's side of the case to the jury almost exclusively on the liability issue. It is a risk that apparently backfired.

The motion for remittitur was properly denied and the verdict of the jury should stand as entered.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy

G. S. ALLEN, J. (dissenting).

I respectfully dissent. I am unable to agree with my colleagues' resolution of the first issue raised on appeal. I do not agree that plaintiff has carried the burden of proof that the statements in the *Enquirer* article were false. Contrary to plaintiff's counsel's repeated argu-

ments to the jury and to my colleagues' conclusion, the article in question does not accuse plaintiff of committing the sexual assault. Instead, it is a news account of plaintiff's arrest as a suspect and the facts leading up to why plaintiff was a suspect.

A statement that an investigation of a crime is underway does not raise to the level of an accusation that the person being investigated committed the crime. Cf. *Jones* v *Schaeffer*, 122 Mich App 301, 305; 332 NW2d 423 (1982).

Omitted from the majority opinion is the most important part of the news story — its headline. In boldface type the headline reads:

"Police arrest suspect in baby-sitter assault[.]"

It is this boldfaced headline which first captures a reader's attention. It does not state that plaintiff committed the assault. It states what was true, namely that plaintiff was arrested and was a suspect.

The body of the article then proceeds to recite the details establishing probable cause to make the arrest. Comparison of those details set forth in the printed story with the content of the police reports introduced into evidence as defendant's Exhibits A, B, C, D, and the testimony of township police officers at trial discloses that, except for one minor misstatement of fact and the arguable use of the word "charged," every statement in the printed story was true. The minor error was the statement that plaintiff was identified by *his* children rather than by his stepchildren. Minor inaccuracies do not constitute falsity. "If the gist, the sting, of the article is substantially true, the defendant is not liable." *Rouch* v *Enquirer & News of Battle Creek, Michigan*, 137 Mich App 39, 43, n 2; 357 NW2d 794 (1984). Slight inaccuracies will not make an otherwise accurate article false, pro-

vided the inaccuracy in no way alters the gist of the article. *Fisher* v *Detroit Free Press*, 158 Mich App 409. 414; 404 NW2d 765 (1987), lv den 428 Mich 914 (1987), reconsideration den 429 Mich 882 (1987). See also, *Kurz* v *The Evening News Ass'n*, ___ Mich App ___; ___ NW2d ___ (1990); *McCracken* v *Evening News Ass'n*, 3 Mich App 32, 40; 141 NW2d 694 (1966); *Orr* v *Argus Press Co*, 586 F2d 1108, 1112-1113 (CA 6, 1978), cert den 440 US 960; 99 S Ct 1502; 596 L Ed 2d 773 (1979). Whether an article is substantially true is a legal question. *Rouch*, 137 Mich App at 43, n 2. In my opinion the statement that defendant was identified by his children rather than his stepchildren is a minor error which is not false in any material respect.

Of greater concern is the use of the word "charged." The word appears three times in the article. It is true that plaintiff was never formally charged in the sense that a written warrant was issued. But it is also true, and the testimony at trial undisputably discloses, that after the officers interviewed the victim who identified plaintiff as the assailant, plaintiff was arrested by officers, was handcuffed, and was taken to the police station where he was booked on charges of criminal sexual conduct in the first degree and felonious assault. Defendant's Exhibit A, a uniform standard incident report used by the Bedford Township Police Department, sets forth the details of the incident and contains the following:

> DISPOSITION: PROSECUTOR PATTISON was beeifed [sic] on the complaint and the circumstances surroudding [sic] the arrest of suspect. He advised to lodge the suspect on CSC 1st. The suspect was transported to Calhoun Co jail by SGT OWENS and was booked on the charge. The report shall be submitted to the prosecutor for review, date.

The deposition of John Bell, Chief of Police of Bedford Township from 1972 until his retirement in 1984, confirms the facts set forth in the incident report:

> *Q.* [Defense Counsel Bernius:] Prosecutor Pattison was advised as to what the officers had found and heard from the witnesses, isn't that correct?"
>
> *A.* [Bell:] Yes.
>
> *Q.* And what office did Pattison work for?
>
> *A.* Calhoun County Prosecutor.
>
> *Q.* Do you recall his full name?
>
> *A.* No. I don't.
>
> *Q.* Okay. And Prosecutor Pattison authorized Mr. Rouch to be arrested on a charge of criminal sexual conduct, first degree, isn't that correct?
>
> *A.* Yes.

Given the above uncontroverted facts, I fail to comprehend why the statement that defendant "was charged" and that "the charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office" was false. Only if one narrowly construes the word "charged" to mean a formal warrant issued by the prosecutor's office is the statement false. But if one construes "charged" in its popular and generally accepted usage as meaning "accused," then the statement is accurate.

Webster's II University Dictionary defined the word "charge" as follows: "[T]o make an accusation against: accuse". Undeniably, plaintiff was "accused" by the prosecutor and/or the arresting officers of suspected criminal sexual conduct. At trial, plaintiff himself used the

word "charge" in its popular and generally accepted sense:

> *Q.* [Plaintiff's Counsel Jereck:] What did you tell the Chief? Were you willing to talk to the police about what this was about or not?
>
> *A.* [Rouch:] Yes, I asked him what the *charge* was and he told me it was a sexual assault on a child — that's what he told me.
>
> * * *
>
> *Q.* Okay. At any rate, after they talked to you, what did they do with you?
>
> *A.* They told me that I was — that, you know, the *charge* that they — that I was being *charged* with. [Emphasis supplied.]

The dual connotation of "charge" was recognized by the Michigan Supreme Court upon review of this Court's opinion in *Rouch*, *supra*.

In *Rouch*, 137 Mich App at 43, our Court stated:

> Although plaintiff was arrested for the crime, he was never charged.[2]

---

[2] **By itself, this particular inaccuracy is not libelous. If the gist, the sting, of the article is substantially true, the defendant is not liable . . . . In this limited context, the sting is the fact of the arrest. To most of the reading public, the additional fact of being formally charged by the prosecutor adds little. The fact that he did not commit the rape *and that none of the underlying facts of the story are true, however, defeats the defense that the article was substantially true.* [Emphasis added.]**

On appeal our Supreme Court declined to rule that plaintiff was "never charged." Instead the Court stated

that plaintiff was "never *formally charged* with the crime." *Rouch* v *Enquirer & News of Battle Creek*, 427 Mich 157, 160; 398 NW2d 245 (1986), reh den 428 Mich 1207 (1987). In so stating, the Court clearly recognized the distinction between the generally accepted use of the word "accused" and its technical, legalistic meaning.

More significantly, by remanding the case to the trial court with the admonition that "plaintiffs who choose to bring actions in libel on the basis of such reports must *first prove that the statements were false*," *Id.*, at 206, the Court implicitly, if not explicitly, rejected the statement in footnote 2 that none of the underlying facts were true and thus the defense that the article was substantially true was defeated. Had the Supreme Court believed that the use of the word "charged" in itself constituted falsity, there would be no reason to remand for trial on the issue of the article's falsity.

In my opinion plaintiff should not be permitted upon testifying to use the word "charge" as it is customarily and popularly understood, but on appeal to employ the word in its narrow and legalistic meaning of issuance of a formal warrant. In my opinion newspapers should not be held to technical legal language. Instead they should be held to the use of words as they are customarily and popularly used. Clearly, although plaintiff was not formally charged, he was accused of a sexual offense on the night in question. The news article so stated. Viewed in this light there is not a single statement in the article, except the reference to identification by plaintiff's children rather than his stepchildren, which is not true. There being no material falsity established by

plaintiff, the judgment should be reversed and the case dismissed.

/s/ Glenn S. Allen, Jr.

VERDICT FORM, CALHOUN COUNTY, MICHIGAN CIRCUIT COURT, RETURNED DURING TRIAL ON FEBRUARY 19, 1988

Rouch vs Enquirer & News 87-412 CZ

FORM OF THE VERDICT

(1) WERE THERE FALSE STATEMENTS IN THE ARTICLE PUBLISHED BY THE DEFENDANT ON DECEMBER 22, 1979?

YES ☒ NO ___

(2) WERE THE STATEMENTS MATERIALLY FALSE, TENDING TO HARM THE PLAINTIFF'S REPUTATION, THAT IS, DID THEY MAKE THE ARTICLE LIBELOUS?

YES ☒ NO ___

(3) WAS THE DEFENDANT NEGLIGENT IN PUBLISHING THE ARTICLE OF DECEMBER 22, 1979?

YES ☒ NO ___

(4) WAS THE NEGLIGENCE OF THE DEFENDANT THE PROXIMATE CAUSE OF INJURY TO THE PLAINTIFF?

YES ☒ NO ___

(5) DID THE PLAINTIFF SUFFER ACTUAL DAMAGE?

YES ☒ NO ___

IF YOUR ANSWER TO ANY OF THE ABOVE QUESTIONS IS "NO," THEN YOU MUST RETURN A VERDICT THAT *THE PLAINTIFF HAS NO CAUSE OF ACTION AGAINST THE DEFENDANT.*

IF YOUR ANSWER TO ALL OF THE ABOVE QUESTIONS IS "YES," THEN YOUR VERDICT WILL BE *FOR THE PLAINTIFF* IN THE AMOUNT OF THE ACTUAL DAMAGES AS YOU FIND THEM TO BE.

(6) WHAT IS THE AMOUNT OF PLAINTIFF'S ACTUAL DAMAGES?

$1,000,000.00

ALLEGED DEFAMATORY ARTICLE, PUBLISHED DECEMBER 22, 1979 BY DEFENDANT, ENQUIRER AND NEWS OF BATTLE CREEK

Police arrest suspect in baby-sitter assault

A 43-year-old man has been arrested and charged with the sexual assault of a 17-year-old women who was baby-sitting with his children at his ex-wife's house on North Finlay Avenue in Bedford Township.

The suspect has been identified by Bedford Township police as David J. Rouch of 631 Golden Ave. He is free on a $10,000 personal recognizance interim bond pending his arraignment in District 10 Court next week. Rouch is charged with first-degree criminal sexual conduct.

Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said.

The victim later called a relative, who took her to Community Hospital and then called police. The suspect was identified by his children, according to police.

Rouch was arrested at his home by Emmett Township police, who were informed where he lived by Bedford Township investigators.

The charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office.

CORRECTION PUBLISHED BY DEFENDANT ENQUIRER AND NEWS OF BATTLE CREEK

Emmett Township man not charged in rape case

SETTING IT STRAIGHT

An Emmett Township man, accused last December of sexually assaulting a young woman, was never formally charged in the case and police later arrested another man who is being prosecuted for the crime.

David J. Rouch of 631 Golden Ave. was taken into custody on Dec. 21, 1979, after the young woman, baby sitting at the home of Rouch's ex-wife, was sexually assaulted. Bedford Township police announced that Rouch had been implicated and that he had been apprehended with the permission of the county prosecutor on a charge of first degree criminal sexual assault.

But Assistant Prosecutor Rick Pattison, who approved Rouch's arrest, declined to issue formally a warrant several days later. He said Tuesday that his decision was based on insufficient proof and because he had learned that State Police had another suspect.

Rouch had posted a $10,000 personal recognizance interim bond on Dec. 21 and was released from the Calhoun County Jail. Pattison's later action removing Rouch as a suspect came on Jan. 2. That fact hasn't been publicized until now.

On April 1, David Michael Green of 197 Collier Ave. was arrested in connection with the incident. He stood mute during his preliminary examination in May on a charge of criminal sexual conduct, first degree, and was bound over to Circuit Court for trial. He is free on $8,000 bond.

EXCERPTS FROM TRIAL TRANSCRIPT, COMPLAINT, AND BRIEFS

• • •

JURY CHARGE AT TRIAL (Excerpt)
[Tr 1058-1061]

(State of Michigan – Circuit Court – County of Calhoun – File No. 87-412)

(February 18, 1980)

* * *

(1058) * * * [THE COURT]: I shall now explain to you the burden which the law places on the Plaintiff to establish the Plaintiff's claim. When I say that a party has the burden of proof, I mean the evidence must satisfy you that the proposition on which that party has the burden of proof has been established by evidence which outweighs the evidence against it. You must consider all of the evidence, regardless of which party produced it. Now, in order to prevail in this case, the Plaintiff must prove by a preponderance of the evidence, first, that the Defendant printed an article making statements of fact about the (1059) Plaintiff which the Defendant circulated to other people. This, the Defendant has admitted. And you may accept as established that the Plaintiff has proven this.

Secondly, that statements in the article were false. In deciding whether any statements in the article were false, you must interpret the words according to their ordinary and obvious meaning. You must give the words the fair and reasonable interpretation that an average reader would give them. You need not look at words used in the article according to any technical or legal definition. Whether the statements in the article were false is for you to decide after considering the statements in the article, in the light of all of the evidence in the case.

Thirdly, the Plaintiff must prove that false statements in the article were materially false and tended to harm the Plaintiff's reputation. That is, that they made the article libelous. In determining whether an article is libelous, it is necessary to read the article as a whole, and fairly and reasonably construe it in determining whether the false portions make the article libelous in character. You should consider the meaning of the article in deciding if it libeled the Plaintiff. The meaning of the article is that meaning which under the circumstances a reasonable person who (1060) read the article reasonably understands to be the meaning intended.

Fourthly, the Plaintiff must prove that the Defendant was negligent in publishing the false statements. When I use the word negligent, I mean the failure to do something which a reasonably careful newspaper would do, or the doing of something which a reasonably careful newspaper would not do under the circumstances which you find existed in this case. It is for you to decide what a reasonably careful newspaper would do or would not do under such circumstances.

Fifthly, the Plaintiff must prove that the negligence of the Defendant in publishing the false statements was the proximate cause of injury to the Plaintiff. When I use the words proximate cause, I mean, first, that there must have been a connection between the conduct of the newspaper, which Plaintiff claims was negligent, and the injury Plaintiff suffered; and second, that the occurrence which is claimed to have produced the injury was the natural and probable result of such conduct of the newspaper. The exact damages need not have been foreseen, so long as the results are a natural and probable consequence of the Defendant's conduct.

Sixth, that the Plaintiff did, in fact, suffer some actual damage from the false statements.

(1061) Your verdict will be for the Plaintiff if you decide that all of these things have been proven by a preponderance of the evidence. Your verdict will be for the Defendant if you decide that any one of these things has not been proven by a preponderance of the evidence.

* * *

TESTIMONY OF STAN KAUFMAN, AT TRIAL (Excerpts)
[Tr 581-583, 591, 607]

(State of Michigan – Circuit Court – County of Calhoun – File No. 87-412)

(February 12, 1988)

* * *

(581) * * * Q. Okay. Mr. Kaufman, I'm showing you a reproduction of a sheet of the Enquirer, of December 22, 1979, and it has been introduced in evidence and marked Exhibit two, and refer you to a portion of the Exhibit, the headline of which is "Police Arrests Suspect in Babysitter Assault." I will ask you first if you have any knowledge of that article?

A. Yes.

Q. What is your connection with that article?

A. I wrote it.

Q. Would you tell us, please, how you gathered the information that is contained in that article?

A. By telephone.

Q. And would you tell us in detail how you got it?

A. Oh, I made my telephone rounds in the morning.

Q. Okay. Just one moment, Mr. Kaufman. You made your rounds what morning, can you tell, looking at this?

A. Friday, December 21.

Q. I see. And this was — this would be around 8:00 in the morning of that day?

(582) A. Telephone rounds, yes.

Q. Okay. And tell us what happened.

A. And I first — my first call to Emmett Township, they told me that Bedford had something, I would have to call them to get the information from them. I called Pennfield, my next stop on the calls, and I called Bedford, and got information about this case.

Q. What information did you get at that time?

A. Just what you see here.

Q. Did you get that entire story then on that morning?

A. I had the entire story. Well, not the entire story; I had most of the story until the afternoon, when I got the rest of it.

Q. Can you tell us how much you learned on the first call on Friday morning?

A. That a man had been arrested, what he had been charged with, some of the particulars of the incident, and that we would have to wait to use it if we wanted to — we had his name, and we did not use it right away.

Q. Were you given his name at that time of the first call?

A. I don't recall if I had it in the morning or not; I'm not positive. But it was decided we weren't going to use the story that morning anyhow.

Q. That would have been for the Friday paper?

A. Friday edition, that's right.

(583) Q. You didn't use the story for that, did you?

A. No, no.

Q. Okay. What happened next in your experience with the gathering of the news and writing of this story?

A. I decided to put it aside for awhile until in the latter part of the afternoon. No, I take it back, I take it back. There was a call made to the Prosecutor's office, and we were told, yes, this had occurred, and that the man had been arrested and Bedford Township had the story.

Q. Go ahead.

A. Late that afternoon, I received a call from Bedford Township.

Q. Do you know from whom that call came?

A. I think it was either Sergeant Minier or Chief Bell.

Q. Do you know which?

A. I'm not sure. I'm not sure which one it was.

* * *

(591) * * * Q. The truth of the matter is you had no documentation of any kind in your possession when you prepared that article, isn't that true?

A. Written, no.

Q. That's right. You only — your claim is that anything that you put in the paper concerning Exhibit two was provided to you by telephone by either Chief Bell or David Minier?

A. Right.

Q. And you can't remember which one it was that gave it to you?

A. Right.

* * *

(607) * * * Q. Okay. Do you feel, under any circumstances, that you would have an obligation to go out and double-check the information?

A. Are we talking about this case?

Q. All right. Let's talk about this case.

A. No.

Q. Why not?

A. Because I relied on the honesty of Bell in giving me the information — or Minier.

Q. All right. And what obligation, if any, Mr. Kaufman, do you have as a newspaper reporter, or that you had as a newspaper reporter back in December, to Mr. Rouch when you printed that article?

A. I didn't know Mr. Rouch.

* * *

TESTIMONY OF JOHN BELL, AT TRIAL (Excerpts)
[Tr 806-808, 831]

(State of Michigan – Circuit Court – County of Calhoun – File No. 87-412)

(February 17, 1988)

* * *

(806) * * * Q. Let's put it this way so there is no confusion. With regard to the arrest of that suspect, on or about this date, were you ever contacted by the Enquirer News that you can recall — specifically by one Stan Kaufman?

A. About this case?

Q. About this case.

A. No, I wasn't contacted by him.

Q. Did you ever advise Stan Kaufman as to who it was that you arrested, namely one David Rouch?

A. No.

Q. Did you ever give Stan Kaufman any details of the alleged offense that took place?

A. No.

Q. Would you look at Deposition Exhibit one?

A. Yes.

(807) Q. Okay. The first question I'd like to ask you, was it David J. Rouch? Are we talking about the same suspect, David Rouch?

A. Yes.

Q. And specifically, with regard to any fact that's represented in there or stated in there, did you ever reveal that to a non-police source?

A. No.

Q. You are sure about that?

A. Yeah.

Q. Can you explain why you would be positive about something like that even this much time later?

A. Cause we had a policy that the information on a suspect or a person arrested would not be given out until after he was taken to court and arraigned.

Q. Why would you have such a policy?

A. It's done all over — Battle Creek, Springfield, Emmett — everybody did it that way. This was something that was left with me. Chief Stanton had a policy that you didn't let it out. It was a policy that we just didn't do it.

Q. Do you know why it was a policy?

A. You might give out information and it would be the wrong person and there you are with egg on your face.

Q. As a police officer, even, do you know what your personal practice was prior to this?

(808) Q. When I was just a patrolman?

Q. Yes.

A. No, you didn't give it out.

Q. So regardless of the passage of time, you are satisfied with your testimony here?

A. Yes.

Q. Are you satisfied that you had no such conversations with anyone with the press concerning the material in that article?

A. No. I've talked to Stan Kaufman lots of times, but I never gave out information. Stan used to call me about other things when I was a fireman — in both departments — and he was reporter for the Enquirer, but I never would give out information until the man was arraigned.

* * *

(831) * * * Q. Any of those official or public records that counsel's referred to, did you ever give Stan Kaufman any of that?

A. I don't believe so.

Q. To your knowledge, did any of your officers give him any of those?

MR. JERECK: To your knowledge, did any of your officers give him any of those — did I say officers?

A. The record.

Q. Were they authorized to give records out?

A. Not by me.

Q. Are you authorized to give police department records at any time?

A. On something like this, no.

Q. On an investigation such as this, are these public records, as counsel referred to them?

A. No. Just anybody — just any Tom, Dick or Harry couldn't get a copy.

Q. There are records kept for police department purposes?

A. Yes.

* * *

TESTIMONY OF DAVID MINIER, AT TRIAL (Excerpt)
[Tr 432-435]

(State of Michigan – Circuit Court – County of Calhoun – File No. 87-412)

(February 11, 1988)

* * *

(432) * * * Q. And were you on duty on the early morning hours of December 21, 1979?

A. Was that a Friday?

Q. I believe it was a Friday.

A. Yes, sir, I was.

Q. And were you present on the occasion that Mr. Rouch had been brought to the Bedford Township Police Department?

A. I believe that he was at the Bedford Township Police Department at the time that I arrived for work.

Q. Okay. And were you involved with the investigation of the alleged incident that Mr. Rouch had been brought to the station for?

A. No, sir, I was not.

Q. Did you participate in any way with regard to Mr. Rouch that morning?

A. No, sir.

Q. Do you know who took him to Marshall to the County Jail, if you remember?

A. No, I don't recall who transported him.

Q. And neither did you interrogate him or involve yourself in the investigation of the rape, is that right?

A. No, sir.

Q. Do you know who Stan Kaufman is?

A. Yes, sir.

(433) Q. Tell the jury who Stan Kaufman is.

A. Stan Kaufman is a reporter for the Battle Creek Enquirer News.

Q. Mr. Minier — Officer Minier, did you ever have any conversations with Stan Kaufman of the Battle Creek Enquirer and News with regard to this arrest or alleged rape or rape — whatever you want to call it — and Mr. Rouch?

A. No, sir.

Q. Did you ever supply Mr, Kaufman with any copies of any police reports that had been made about this rape involving Mr. Rouch?

A. No, sir.

Q. You've been a police officer for how long?

A. Over 23 years.

Q. And do you have a practice as a police officer with regard to the identification of people who are suspects or taken into custody?

A. Yes, sir. It's a practice of the profession not to release any information on a suspect prior to arraignment.

Q. And why is that, please?

A. That's to protect their rights and to make sure that the information does not get released to the wrong person.

Q. And so what doesn't happen to you?

(434) A. So there is not any suit or liability.

Q. All right. Now, you do not release that — that's not — that's the practice for your own benefit, isn't it?

A. Yes, sir.

Q. It's not the practice for the paper, is it?

A. No, sir.

Q. All right. Look at Exhibit two, Officer. I don't know if you ever had occasion to read that article, but review it, please.

(The Witness complies.)

A. I've read it.

Q. Do you recall if you read that article when it was first published back in December of 1979?

A. Yes, sir, I believe I did.

Q. I've asked you whether or not you personally gave any information to Mr. Kaufman or to the Battle Creek Enquirer News and you said you haven't, correct?

A. That's correct.

Q. And you say you were on duty that night when Mr. Rouch was brought in?

A. I wasn't on duty at the time that he was brought in.

Q. Excuse me. You came in, apparently, after he had been brought there?

A. Yes, sir.

Q. And I want you to tell the jury: do you, as a police (435) officer with the Bedford Township Police Department, know if anybody else from the Department gave Mr. Kaufman or any other representative of the Battle Creek Enquirer and News any information concerning the rape of that girl in Bedford Township, if you know?

A. No, I do not.

* * *

COMPLAINT

(State of Michigan – Circuit Court – County of Calhoun)

(Filed December 5, 1980)

(DAVID J. ROUCH, Plaintiff, vs. BATTLE CREEK ENQUIRER & NEWS, a Michigan corporation, Defendant — File No. 80-1263CZ)

NOW COMES the above-named Plaintiff by his attorney, John M. Jereck, and in support of his Complaint says as follows:

1. That Plaintiff is a resident of the County of Calhoun, State of Michigan.

2. That Defendant, Battle Creek Enquirer & News, is a Michigan corporation located in the City of Battle Creek, County of Calhoun, State of Michigan, and is the owner and publisher of the Enquirer & News, a newspaper of general circulation published at Battle Creek, Calhoun County, Michigan.

3. That on or about December 22, 1979, said Defendant falsely and/or maliciously published an article concerning your Plaintiff in said newspaper and that the charges made therein were false and defamatory as follows: that Plaintiff was arrested and charged with the sexual assault of a 17-year old woman who was babysitting with Plaintiff's children at Plaintiff's ex-wife's residence; that Plaintiff was free on a $10,000 personal recognizance bond; that Plaintiff was charged with first-degree sexual conduct; that Plaintiff attacked said 17-year old woman and used a knife to cut her clothes off; that Plaintiff was identified as the person making said assault by his children.

4. That by said words, Defendant meant and was understood to mean that Plaintiff was the person who sexually assaulted and raped a 17-year old woman who was babysitting his children.

5. That said publication of said facts as they related to your Plaintiff were false.

6. That by means of publishing by Defendant of said false, scandalous, and defamatory words, your Plaintiff has been greatly and permanently injured in his good name, fame and credit and has been brought into public scandal, infamy, and disgrace with and among his neighbors, friends, fellow employees, and/or other social contacts and that said persons believe Plaintiff to be guilty of the acts falsely reported in the newspaper in question by said Defendant; that by reason of the acts and false statements of Defendant, Plaintiff has been damaged in the sum of Five Hundred Thousand ($500,000.00) Dollars.

7. That said false statements as above alleged were made with total disregard of Plaintiff's privacy and individual rights; that said allegations were reckless and made without any concern for the truthfulness or falsity of the allegations; that your Plaintiff as a result has been totally humiliated and mortified by the charges made by said Defendant and that, therefore, your Plaintiff is entitled to exemplary and/or punitive damages of Five Hundred Thousand ($500,000.00) Dollars.

WHEREFORE, your Plaintiff prays:

1. That a Judgment be entered in favor of Plaintiff in the amount of Five Hundred Thousand ($500,000.00) Dollars;

2. That Plaintiff be awarded punitive and/or exemplary damages of Five Hundred Thousand ($500,000.00) Dollars.

/s/ John M. Jereck
Attorney for Plaintiff
243 Capital Avenue, N.E.
Battle Creek, Michigan 49017

Dated: December 2, 1980

EXCERPT FROM RESPONDENT'S BRIEF IN THE MICHIGAN SUPREME COURT, No. 75044, FILED SEPTEMBER 25, 1985

* * *

Page

POINT II:

THE NEWSPAPER ARTICLE ACCURATELY REPORTED THE ARREST AND PLAINTIFF'S LIBEL CLAIM IS CONSTITUTIONALLY BARRED. 20

A. THE DEFENDANT HAD A FIRST AMENDMENT PRIVILEGE TO PUBLISH THE ACCURATE ACCOUNT OF PLAINTIFF'S ARREST. 20

B. DEFENDANT DID NOT PUBLISH WITH THE REQUISITE "FAULT." 22

* * *

EXCERPT FROM RESPONDENT'S BRIEF IN THE MICHIGAN COURT OF APPEALS, No. 108595, FILED NOVEMBER 14, 1988

* * *

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POINT I:

PLAINTIFF FAILED TO OVERCOME THE "CONSTITUTIONAL DEFENSE OF TRUTH," AND THIS ACTION MUST BE DISMISSED. 11

A. The Policies Underlying the Constitutional Defense of Truth 11

B. The Origins of the Constitutional Defense of Truth 13

C. The Constitutional Defense of Truth Applies if the Article Is Substantially Accurate. 18

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(3)

Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

No. 92-895

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DAVID J. ROUCH,

Petitioner,

v.

ENQUIRER AND NEWS
OF BATTLE CREEK, MICHIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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34 pp

QUESTIONS PRESENTED

1. Whether petitioner, who urged the Michigan Supreme Court to undertake an independent appellate review in this case, may now properly challenge that Court for having done so.

2. Whether publication of a substantially fair and accurate newspaper report of a libel plaintiff's arrest is protected by the First and Fourteenth Amendments.

LIST OF PARTIES AND STATEMENT PURSUANT TO RULE 29.1

The list of parties contained in the Petition for Writ of Certiorari is correct. Respondent Enquirer & News of Battle Creek is a newspaper published by a wholly-owned subsidiary of Gannett Co., Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

CITATION OF OPINIONS BELOW

The decision which Petitioner asks this Court to review is reported at 440 Mich. 238, 487 N.W.2d 205 (1992) and is reprinted in Petitioner's Appendix ("Pet. App.") at 1. That decision reversed the Michigan Court of Appeals holding reported at 184 Mich. App. 19, 457 N.W.2d 74 (1990) and reprinted at Pet. App. 165. The decision of the Trial Court denying Respondent's motion for judgment notwithstanding the verdict is not officially reported; portions are reprinted at Pet. App. 151.

Before trial, the Michigan Circuit Court granted summary judgment dismissing the action; its unreported order and decision appear at Pet. App. 57. The pre-trial decision of the Michigan Court of Appeals, reversing the grant of summary judgment, is reported at 137 Mich. App. 39, 357 N.W.2d 794 (1984) and is reprinted at Pet. App. 63. The pre-trial decision of the Michigan Supreme Court which remanded the case for trial is reported at 427 Mich. 157, 398 N.W.2d 245 (1986) and is reprinted at Pet. App. 83.

STATEMENT OF THE CASE

This private figure libel action is based upon a "police blotter" newspaper article which reported the petitioner's arrest for committing a violent crime.

1. Petitioner's Arrest

Early in the morning of Friday, December 21, 1979, a 17-year-old babysitter was brutally raped at knifepoint in Battle Creek, Michigan.

Following the rape the police were called. They interviewed the victim and two witnesses (R.504a-06a, 508a).[1] All three independently identified petitioner David Rouch as the assailant (R.145a, 176a, 420-21a, 504a, 506a, 508a).

Within two hours of the attack, at 5:25 a.m., the police arrived at petitioner's house, summoned him outside (R.509a), told him they were "charging" him with the rape, and arrested him (R.144-45a). Petitioner was handcuffed, interrogated, and fingerprinted (R.54-57a, 144-46a, 169a, 508-09a). Briefed by police as to the

---

[1] Page references to the appendices filed in the Michigan Supreme Court are designated "R.____."

crime and the circumstances surrounding petitioner's arrest, the local prosecutor authorized petitioner's booking in the local jail on a charge of Criminal Sexual Conduct in the First Degree (Pet. App. 192-93; R.417a, 507a).

Within a few hours, a Magistrate released petitioner on bond (R.510a), on condition that he appear for his arraignment on December 28, 1979 (R.147a).

2. **Preparation of the News Article**

The article at issue in this case was written by Stan Kaufman, a reporter for more than 25 years (R.289a). On the day in question Kaufman, who had won a number of journalism awards (R.290a, 379-80a), followed his normal routine and made the "rounds" of local police departments (R.289-93a, 403-04a).

Kaufman received all the information contained in the news article during telephone conversations with the police (R.269a, 292-93a, 593-94a.)[2] He typed the article,

---

[2]Eight years later at the trial, the reporter was uncertain as to the identity of the police officers with whom he had spoken (R.292-93a, 296-97a). The reporter thought he had talked with either the Chief of Police or a Sergeant (R.296-97a), but both officers denied talking to the reporter (R.193a, 401a). Other police officers participated in petitioner's arrest (R.212a, 400a, 418a), however, and the police witnesses did not know whether one of those other officers had spoken with the reporter (R.194-95a, 418a). The reporter obviously discussed the arrest with the police, since the news article accurately recounts precise details of the arrest (R.362-63a, 430a). Petitioner agrees that the police identified him to the newspaper (R.60-61a).

Nevertheless, the precise identity of the police officers to whom the reporter spoke is irrelevant to the falsity of the article, and the Court below did not consider the issue. (Pet. App. 9-10 and n. 14).

and submitted it for publication (R.296-97a). The article (Pet. App. 198) states:

> POLICE ARREST SUSPECT IN
> BABY-SITTER ASSAULT
>
> A 43-year-old man has been arrested and charged with the sexual assault of a 17-year-old woman who was baby-sitting with his children at his ex-wife's house on North Finlay Avenue in Bedford Township.
>
> The suspect has been identified by Bedford Township police as David J. Rouch of 631 Golden Ave. He is free on a $10,000 personal recognizance interim bond pending his arraignment in District 10 Court next week. Rouch is charged with first-degree criminal sexual conduct.
>
> Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said.
>
> The victim later called a relative, who took her to Community Hospital and then called police. The suspect was identified by his children, according to police.
>
> Rouch was arrested at his home by Emmett Township police, who were informed where he lived by Bedford Township investigators.
>
> The charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office.

The article accurately reports the arrest. It does not, as petitioner contends, accuse petitioner of committing the rape, but instead specifically notes in its headline and throughout its text that petitioner was arrested as a "suspect." It dispassionately reflects the details—such as

ages, addresses, times and locations—contained in the relevant police reports (R.407-23a, 503-09a).

Six days after the news article was published, petitioner was told his scheduled arraignment would not take place (R.62a). The next month, the prosecutor decided to drop the charges against petitioner (R.141a).

Although the newspaper continued regularly to contact the police, the prosecutor, and the courts for news about the criminal process, no one ever told its reporters that the charges were dropped. Had anyone done so, the newspaper would have published a timely follow-up article (R.384-85a, 388-90a).

Petitioner instead filed his complaint almost a year later, on December 5, 1980. The case was tried in February 1988, and the jury returned a $1,000,000 verdict against the newspaper. With interest, the judgment in the case approximated $4,000,000 when the Michigan Supreme Court dismissed it in the decision now challenged.

3. **The Article Was Accurate in All Material Respects**

According to petitioner, the principal falsehood in the article was its statement that he was "charged." Petitioner also alleges that the article inaccurately recounted that the prosecutor authorized the charge against him, and erroneously stated that he was identified to the police by his children (Pet. App. 9). Petitioner's claims, however, ignore the uncontradicted trial evidence.

First, the undisputed evidence demonstrated that petitioner had been "charged" with a crime. As the Court below recognized (Pet. App. 27, n. 30), petitioner (R.52a-55a, 145a), his son (R.169-70a, 173-74a), his expert witness (R.141a), a police sergeant (R.197-98a, 211a) and

a police chief (R.410a) all testified at trial that he was "charged," and official police and court records confirmed it (Pet. App. 27, n. 32; R.503a, 509-10a). The evidence on this point was so unequivocal and compelling that petitioner and his attorney formally "concede[d] that the [newspaper] article in question and its reference to the [petitioner] being arrested *and being charged . . . were true*" (Pet. App. 27; Respondent's Appendix ["Resp. App."] 1a-2a) (emphasis added).

Indeed, petitioner's claim that he was not "charged" is not based on any trial evidence, but is instead premised upon petitioner's flawed interpretation of Michigan law. Notwithstanding petitioner's legal theory that he could not have been "charged" prior to his formal arraignment, it is quite clear under Michigan law that "once the police act on an accusation," as they did in this case, an arrestee is "charged" (Pet. App. 26). Petitioner's thesis to the contrary should be disregarded by this Court.

Second, as the Michigan Supreme Court observed, the evidence indisputably showed that the local prosecutor did authorize petitioner's booking on a charge of Criminal Sexual Conduct in the First Degree (Pet. App. 4, n. 5, 7-9, 28, 192-93; R.417a, 507a). The article was thus true in this respect as well. Contrary to the claim in the Petition for Certiorari, Respondent has never conceded the falsity of that portion of the newspaper article (*Compare*, Petition for Certiorari p. 22 *with* Resp. App. 5a.)

Finally, petitioner is technically correct when he states that he was not identified as the rapist by his "children," as stated in the newspaper article. Petitioner *was*, however, identified independently by multiple eyewitnesses, including his two *stepchildren*, with whom petitioner had lived when he was married to their mother (R.162a). The

rape victim also identified petitioner to the police, and she too had a pre-existing relationship with him, enhancing her ability to recognize him (R.162a, 504-08a): earlier in the evening, petitioner had driven her to the scene of the assault (R.48-49a, 161a, 506a). Prior acquaintance, of course, is the most powerful indicator of a valid criminal identification. As the Michigan Supreme Court held, this minor inaccuracy in the newspaper article is not actionable under Michigan common law since the "gist" or "sting" of the news report was that petitioner "was arrested on the basis of the identification of persons who knew him." (Pet. App. 30-31).

REASONS WHY THE PETITION SHOULD BE DENIED

POINT ONE
PETITIONER WAIVED THE CONSTITUTIONAL ISSUE HE NOW ASSERTS

Contrary to the specific requirements of Rule 14.1(h), the Petition for Certiorari fails to specify the stage in the proceedings at which petitioner raised the issues of which he now seeks review. It also fails to describe the manner in which petitioner purportedly raised those issues (Petition for Certiorari p. 7-8).

In fact, petitioner did not challenge the propriety of independent appellate review by the Michigan Supreme Court, and this Court should not, therefore, grant certiorari.

In its appeal to the Michigan Supreme Court, Respondent newspaper argued that the Court was obligated to review the issue of falsity de novo. Respondent relied both upon this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, *reh. den.*,

467 U.S. 1267 (1984), and the Michigan Supreme Court's 1991 decision in *Locricchio v. Evening News Assn.*, 438 Mich. 84, 476 N.W.2d 112 (1991), *cert. denied*, ___ U.S. ___, 117 L.Ed.2d 495 (1992).

In *Locricchio*, the Michigan Supreme Court held that an appellate court must "independently review the record with regard to falsity" in a private figure libel case involving a matter of public interest (Pet. App. 14):

> [I]n *Philadelphia Newspapers v. Hepps* . . . the Supreme Court . . . created an issue of constitutional fact regarding whether a plaintiff carries the burden of proving falsity.
>
> We therefore conclude that an independent appellate review of the burden of proof with regard to falsity in private-figure, public interest cases deters "forbidden intrusion on the field of free expression" as a logical corollary to independent review of actual malice.

Locricchio v. Evening News Assn., supra, 438 Mich. at 113, 476 N.W.2d at 124-25.

In his brief to the Michigan Supreme Court, petitioner did not question or object to independent appellate review of falsity in this libel case. To the contrary, petitioner affirmatively insisted that independent appellate review of falsity was constitutionally required.

Petitioner thus argued to the Michigan Supreme Court the direct antithesis of the position he now asserts to this Court. Petitioner's brief to the Michigan Supreme Court declared:

> *Standard of Review.*
>
> In reviewing the findings of falsity and negligence necessary to overcome the First Amendment protection accorded reports of matters of public interest,

> this Court has recently held that appellate courts must conduct an independent review of the evidence related to issues of "constitutional fact" to ensure that the plaintiff has met his constitutionally mandated burden of proof. . . . The purpose of independent review is not to usurp the proper function of the jury but to ensure that the plaintiff has presented evidence sufficient to meet his constitutionally mandated burden of proof.

(Resp. App. 7a).

Indeed, petitioner not only endorsed the concept of independent appellate review, but insisted also that it be very broad in scope. He urged that it not be limited to discrete constitutional issues, and argued that the independent appellate review instead expand to encompass review of the entire judgment: "this [Michigan Supreme] Court will rule on the *judgment* of that [Michigan] Court [of Appeals] rather than its reasoning and must do so after its own independent review of the evidence presented at trial" (Resp. App. 8a, n.5).

Only after he lost the decision below did petitioner haltingly indicate any uncertainty as to the doctrine of independent appellate review. However, even after the Michigan Supreme Court's decision, and although he challenged the result of the Michigan Supreme Court's analysis in a motion for rehearing, petitioner steadfastly reiterated that independent appellate review was proper. Petitioner did "not allege that it was erroneous for [the Michigan Supreme] Court to independently review the record in the present case . . ." (Resp. App. 9a).

Under Michigan law, a legal argument cannot properly be made for the first time in a motion for rehearing before the Michigan Supreme Court. Such untimely claims

are waived. *Poston v. Ebert*, 221 Mich. 369, 193 N.W. 201 (1923), *rev'd on other grounds*, 266 U.S. 548 (1925); *Lagden v. Concordia Mut. Fire Ins. Co.*, 188 Mich. 689, 158 N.W. 848 (1916). Thus, even had petitioner raised his current argument in his motion for rehearing to the Michigan Supreme Court, it would not be properly raised here. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945).

Petitioner, however, goes much farther than that. He presents to this Court a legal claim *precisely to the contrary* of the claim he made to the Michigan Supreme Court. He now challenges the propriety of independent appellate review of falsity in private figure libel cases, notwithstanding his endorsement of exactly that standard of review in the Michigan courts. Most assuredly, his newly found position is not one upon which certiorari may properly be granted.

POINT TWO

THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE DECISION BELOW

Under Michigan common law, assertedly libelous statements are not actionable unless they are false in a material respect, i.e., their "gist" or "sting" must be false (Pet. App. 18 and n. 23). Time and time again the Michigan Courts have so held. *McAllister v. Detroit Free Press*, 85 Mich. 453, 461, 48 N.W. 612 (1891); *Kovacs v. Mayoras*, 175 Mich. 582, 593, 141 N.W. 662 (1913); *McGuire v. Vaughn*, 106 Mich. 280, 286-287, 64 N.W. 44 (1895); *Fisher v. Detroit Free Press Co.*, 158 Mich. App. 409, 414, 404 N.W.2d 765 (1987). Under the common law of Michigan, the so-called "substantial truth" (or "gist or sting") test presents a question of law, and as such has routinely compelled dismissal without trial of Michigan

libel suits premised upon technically inaccurate use of legal terminology (Pet. App. 192). *Morganroth v. Whitall*, 161 Mich. App. 785, 790, 411 N.W.2d 859 (1987); *Fisher v. Detroit Free Press, supra*, 158 Mich. App. at 414. Newspapers may use "ordinary conversation" to describe legal events. *Bailey v. Kalamazoo Publishing Co.*, 40 Mich. 251, 255-256 (1879).

In Part IV of its opinion (Pet. App. 18-31), the Michigan Supreme Court discussed these common law principles and applied them to the newspaper article at issue in this case. In its discussion, the Court concluded that Michigan common law required dismissal of petitioner's libel action. Because there is an independent and adequate State law basis for the opinion below, certiorari should not be granted.

Noting the constitutionalization of libel law, the Court nevertheless emphasized that the "definition of falsity remains based on the common-law doctrine" (Pet. App. 19) and observed that under Michigan law, constitutional considerations regarding the issue of falsity are effectively redundant: "the constitutional requirement for testing falsity mirrors Michigan's common law test" (Pet. App. 19). Thereafter, the Michigan Supreme Court's discussion emphasized the common law "substantial truth doctrine" (Pet. App. 19, 30) and the "gist or sting" test (Pet. App. 22-23, 30).

The dismissal of this case was based squarely upon settled common law principles. The Michigan Supreme Court criticized the Court of Appeals for failing properly to "ascertain the 'gist' or 'sting' of the article" (Pet. App. 23); "conclude[d] that use of 'charge' . . . cannot be deemed materially false" (Pet. App. 26); and held that petitioner's "additional complaint [of falsity] falls within

the . . . category of cases arising under the substantial truth doctrine" (Pet. App. 29).

The heart of the Michigan Supreme Court's decision lies in its straightforward juxtaposition of the published news article with a version of that article revised by the Court, in which the Court "substitute[d] language that the plaintiff asserts should have been used" (Pet. App. 21). Thus fully accepting petitioner's version of the underlying historical facts, the Michigan Supreme Court concluded that those facts did not establish material falsity as a matter of Michigan law. The Court's conclusion that the "gist or sting of the article is [not] changed by these minor differences" is a simple application of common law principles (Pet. App. 20-22). In applying that settled common law doctrine, the Michigan Court merely engaged in the same common law analysis as that recently used by this Court to dismiss a portion of another libel claim, again as a matter of law and without the need for a trial. *Masson v. New Yorker Magazine, Inc.*, ___ U.S. ___, 115 L.Ed.2d 447, 477 (1991).

The decision below analyzed common law and constitutional maxims. The dismissal of this action, however, was based on a long-settled Michigan common law principle as well as on the First Amendment: "after painstaking review of the whole record *in light of Michigan libel law and* the latest constitutional pronouncements . . . we conclude that the evidence was not sufficient to establish material falsity (emphasis added)" (Pet. App. 31).

Indeed, no matter what the standard of review or substantive law applied, the factual error in the newspaper article at issue in this case is so trivial as to warrant dismissal of petitioner's libel claim, as a matter of law. Because the decision below is independently based upon common law, certiorari should be denied.

POINT THREE

THE PETITION DOES NOT DEMONSTRATE A SUBSTANTIAL CONFLICT

Petitioner suggests that the Michigan Supreme Court's endorsement of independent appellate review of falsity in private-figure libel cases conflicts with a series of earlier decisions (Petition p. 17-18). None of the cases cited, however, warrants review of this case.

Thus in *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 192 (1991), a public figure libel case, the Court held that the plaintiff had failed to prove actual malice. That holding was dispositive; falsity was assumed. *Id.* at 668-69. The Court did not rule on the standard of appellate review of falsity in private figure libel cases, and the decision does not conflict with the decision at bar.

Similarly, both *Bartimo v. Horsemen's Benev. and Protective Ass'n.*, 771 F.2d 894 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986) and *Tavoloureas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (*en banc*), *cert. denied*, 484 U.S. 870 (1988) are public figure libel cases in which the courts independently reviewed the issue of actual malice, but rendered no decision concerning the issue posited by petitioner. In *Nor-west Cable Communications v. City of St. Paul*, 924 F.2d 741, 746-47 (8th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2853 (1991), the Court held merely that the First Amendment does not require independent appellate review of the issue of standing. Both *Starkins v. Bateman*, 150 Ariz. 537, 724 P.2d 1206 (Ct. App. 1986) and *Brown v. K.N.D. Corporation*, 205 Conn. 8, 529 A.2d 1292 (1987) are public official cases which generally discuss appellate review of actual malice determinations; neither decision conflicts with the decision below.

Finally, in *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 672, n. 19 (5th Cir. 1984), the Court rejected independent appellate review of the falsity issue if it would require an appellate court to disregard a jury's "credibility choices based on the demeanor of witnesses." That proposition is entirely consistent with the Michigan law applied in this case, which holds that "an appellate court does not and should not exercise review of credibility determinations." *Locricchio v. Evening News Assn.*, *supra*, 438 Mich. at 112, n. 17, 476 N.W.2d at 124, n. 17.

Because petitioner has therefore utterly failed to demonstrate any real or substantial conflict, certiorari should be denied.

POINT FOUR

THE MICHIGAN SUPREME COURT APPLIED THE PROPER STANDARD OF REVIEW

The First Amendment requires private figure libel plaintiffs such as petitioner to prove falsity before they may recover a judgment based on publication of matters of public interest. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

Most assuredly, the article reporting petitioner's arrest was in the public interest. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1972), this Court emphasized that timely news reports beneficially enable the public to scrutinize the administration of justice, particularly with respect to the "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . ."

The First Amendment interests at stake in the report of petitioner's arrest are of the highest significance. The article:

> involved a matter of paramount public import: the commission and investigation of a violent crime which had been reported to authorities.

Florida Star v. BJF, 491 U.S. 524, 536-37 (1989). Timely reports of arrests serve important sociological purposes. A neighborhood in which a brutal crime has been committed will be comforted to learn, through news reports, that the police have acted on the community's behalf:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980).

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), this Court held in a public official libel case that independent appellate review is required to ensure that no "forbidden intrusion on the field of free expression" occurs. In *Bose Corp. v. Consumers Union of the United States, supra,* 466 U.S. at 511, the Court reiterated that independent review of actual malice in public figure libel cases is necessary to determine whether the evidence in the record is sufficient to "strip the utterance of First Amendment protection . . ." Independent appellate review "reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the pre-

cious liberties established and ordained by the Constitution." *Id.* at 510-11.

So, too, is independent appellate review of falsity in private figure libel cases required by the First Amendment. The Michigan Supreme Court recognized that in *Hepps* this Court held that proof of falsity in private figure libel cases is a "constitutional fact." (Pet. App. 14-15). Final determination of that constitutional fact may not be left to a jury alone, lest crucially important news articles, such as that at issue in this case, be unjustifiably "stripped" of First Amendment protection.

Indeed, independent appellate review of falsity is particularly important in private figure cases where, as in Michigan, a publisher is otherwise protected only by a negligence fault standard. Under the negligence standard, a libel plaintiff who proves falsity will typically recover a judgment. As a practical matter at trial, falsity is the principal, if not the exclusive, liability element in a private figure negligence case. Falsity effectively subsumes the issue of fault, because any creative libel plaintiff can, with 20/20 hindsight, easily lay out a "roadmap" to show the jury that the newspaper could "reasonably" have avoided publishing the falsehood. The negligence "fault" concept is ephemeral protection indeed for a newspaper publisher.

Thus an appellate court must have the constitutional duty and authority to set aside a jury verdict which is based, such as that at bar, on a literal but insubstantial inaccuracy in a news report: "any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one." *Pennekamp v. Florida*, 328 U.S. 331, 371-72 (1946) (Rutledge, J. concurring). Independent

appellate review of falsity in private figure libel actions is necessary "to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of the United States, supra*, 466 U.S. at 505.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 28, 1992

APPENDIX A

EXCERPT (PAGE 6) FROM PETITIONER'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JNOV AND NEW TRIAL (4/15/88)

* * *

In conclusion then it appears that a private person plaintiff in Michigan in a libel case previously enjoyed a presumption of malice in cases of libel per se which entitled plaintiff to recover except in cases where the defense of truth was raised and proved. *However today's standard is that the private person plaintiff in a libel case which involves matters of public concern no longer enjoys the presumption of malice but must prove falsity of the article as opposed to the Defendant having to prove the truth and in addition to the foregoing as well as other elements of libel, must now prove that the publication was the result of Defendant's negligence as opposed to the actual malice burden of public figures ennunciated in New York Times, supra.*

As a preliminary matter it is Plaintiff's opinion that one other major issue should be addressed.

Plaintiff concedes that the article in question and its reference to the Plaintiff being arrested and being charged CSC and thereafter released on bond were true. However, as to the article's reference to facts referred to of details surrounding the alleged incident, a major disagreement of the parties exist.

Plaintiff claims that the reference to specifics of alleged facts surrounding the incident falsely suggests that the Plaintiff in fact committed the crime in question – after all he was identified, according to the article, by his own children.* * *

* * *

EXCEPRT (PAGE 10) FROM PETITIONER'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JNOV AND NEW TRIAL (4/15/88)

* * *

Plaintiff concedes as previously stated that he was arrested, charged with Criminal Sexaul (sic) Conduct and released on a bond as stated in the article published by the Defendant. However, when dealing with facts in support of probable cause, the article is blantly (sic) and totally false. A review of the article itself supports Plaintiff's analysis.

The article itself is composed of the following ten sentences:

1. A 43-year-old man has been arrested and charged with the sexual assault of a 17-year-old woman who was baby-sitting with his children at his ex-wife's house on North Finlay Avenue in Bedford Township.

2. The suspect has been identified by Bedford Township police as David J. Rouch of 631 Golden Avenue.

3. He is free on a $10,000.00 personal recognizance interim bond pending his arraignment in District 10 Court next week.

4. Rouch is charged with first-degree criminal sexual conduct.

5. Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman.

6. He is said to have used a knife to cut the victim's clothes off, police said.

7. The victim later called a relative, who took her to Community Hospital and then called police.

8. The suspect was identified by his children, according to police.

9. Rouch was arrested at his home by Emmett Township police who were informed where he lived by Bedford Township investigators.

10. The charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office.

APPENDIX B

EXCERPTS FROM TRIAL TRANSCRIPT SUMMATION BY RESPONDENT'S ATTORNEY

[1033] The first two questions that you are going to have to answer, ladies and gentlemen, is whether the Plaintiff has proven materially false statements were in the article, and that those materially false statements made the article libelous. What does the Plaintiff claim to be materially false statements? What does the evidence show? First, the main argument was – I'm not sure that it still is – was certainly that the Plaintiff was not arrested. Now, you don't have to figure out whether there was arrest under the criminal procedure code of the State of Michigan. You are not to consider technical or legal definitions. You should use common, ordinary language. It is well within your ability to determine from the evidence whether the Plaintiff was arrested. And I submit that the statement that the Plaintiff was arrested – statements – is true. He was rousted from bed in the middle of the night, he was handcuffed, he was thrown in the back of a police car, dragged down to a police station, fingerprinted, photographed and thrown into a jail cell. Ladies and gentlemen, that is an arrest. The Plaintiff testified that he was arrested. Minier testified that he was [1034] arrested. And Chief Bell testified that he was arrested. The evidence is uncontradicted that he was arrested.

The second claim of material falsity is that the Plaintiff was not charged. Again, what is the evidence on that? In common, ordinary language, the Plaintiff says under oath that he was charged. Minier said under oath that he was charged with criminal sexual conduct in the first degree and felonious assault. Questions from the

Plaintiffs lawyer during the trial indicated that the Plaintiff was charged. And right on the front page of Defendant's Exhibit A, the police report, on the left-hand side, the word charge appears and the word charge appears. Ladies and gentlemen, the evidence shows clearly that the Plaintiff was charged and that is true.

Another claim that has been made to you is that the Prosecutor never authorized the charge as is indicated in the last paragraph of the newspaper article. Again, that is the claim. What is the evidence? Defendant's Exhibit A says, disposition: "Prosecutor Pattison was briefed on the complaint and circumstances surrounding the arrest of suspect. He advised to lodge the suspect on CSC first." He authorized that charge over the telephone.

[1035] What does Mr. Bell say about that question?

Question: "Prosecutor Pattision was advised as to what the officers had found and heard from the witnesses, isn't that correct?"

"Yes."

"And what office did Pattison work for?

"The Calhoun County Prosecutor."

"And Prosecutor Pattison authorized Mr. Rouch arrested on the charge of criminal sexual conduct, first, isn't that correct?"

Answer: "Yes, uh-huh."

"Now, on December 21, did you approve the arrest of David Rouch?"

Answer: "No, the Prosecutor did it."

Question: "So you deferred to the Prosecutor's office for that?"

Answer: "Yes, uh-huh."

That's another example of the claim of material falsity that has simply not been proven.

You will have an opportunity, when you get into the jury room, to compare the police reports containing the

information to which this article relates, and you will find that this article is accurate. That they're even down to the dates of birth of the Defendant – criminal defendant – and the 17-year-old victim. And I [1036] invite you to make that comparison because it will – you will learn unequivocally that the article is accurate and it was received undoubtedly from the police.

There is, Mr. Sullivan agreed in his opening statement, one inaccuracy in this article. It's an inaccuracy that undoubtedly was transmitted by the police to Stan Kaufman. The inaccuracy is in the context of the article as a whole which is how you must evaluate it, not material. It does not make this article libelous. The falsity must be material, you will hear – it must be a major error. The only inaccuracy is that there are two references to children as opposed to stepchildren. But I suggest to you, ladies and gentlemen, that in the context of this article, reporting upon the arrest of the Plaintiff, it is not material – it is not a major factor to report that the suspect was identified by his children as opposed to reporting more precisely that the suspect was identified by his stepchildren and by the babysitter victim, which is what the truth was. The precise and literal truth.

* * *

APPENDIX C

EXCERPTS FROM PETITIONER'S BRIEF IN MICHIGAN SUPREME COURT

* * *

2. Standard of Review.

In reviewing the findings of falsity and negligence necessary to overcome the First Amendment protection accorded reports of matters of public interest, this Court has recently held that appellate courts must conduct an independent review of the evidence related to issues of "constitutional fact" to ensure [25] that the plaintiff has met his constitutionally mandated burden of proof. Locricchio v. Evening News Association, ___ Mich ___ , slip op at 28-30 (No. 86351 Aug. 26, 1991). The purpose of this independent review is to ensure that no jury verdict "against the great weight of the evidence" is allowed to "comprise a forbidden intrusion on protected speech." Id. at 29.

Independent review of the evidence does not include review of credibility issues. Id. at 27, n17. With respect to credibility of witnesses, the reviewing court therefore must assume that testimony favorable to the plaintiff is credible and exclude all directly conflisting testimony from its evaluation. The purpose of independent review is not to usurp the proper function of the jury but to ensure that the plaintiff has presented evidence sufficient to meet his constitutionally mandated burden of proof.

* * *

After a brief excursion into an irrelevant attack on the [37] constitutional analysis of the Court of Appeals[5], (Appellant's Brief at 37-38), Defendant argues that its failure to determine whether there was information suggesting that Mr. Rouch was innocent of the crime cannot be considered negligence supporting liability because any such information would not have affected its use of the word "charged" in the article (Appellant's Brief at 39). It erroneously assumes that such information would have to be obtained from Mr. Rouch himself. On the contrary, the evidence at trial showed that, had Mr. Kaufman talked to the investigating officers themselves, and had he bothered to ask them what Mr. Rouch had to say about the accusation, he would have learned not only that Mr. Rouch denied involvement in the crime and asserted he had an alibi but also that there were factors known to the investigating officers which cast considerable doubt on the accuracy of the eye-witness identifications. By his own admission, Mr. Kaufman made no attempt to determine whether the investigation had produced any exculpatory evidence or whether Mr. Rouch had made any statement denying involvement in the crime (Kaufman 606, 607, 609, 610, 612). Certainly, under these circumstances, a jury could legitimately conclude that Mr. Kaufman acted negligently in failing to make any attempt whatsoever to ensure that his [38] information was complete and could further conclude that Mr. Kaufman's lack of complete information was a major factor contributing to the false impression conveyed by the article as a whole.

---

[5] Defendant's analysis of the Court of Appeals decision concerning negligence is essentially irrelevant here, as this Court will rule on the *judgment* of that Court rather than its reasoning and must do so after its own independent review of the evidence presented at trial.

* * *

APPENDIX D

EXCERPTS FROM PETITIONER'S BRIEF IN SUPPORT OF REHEARING FILED IN MICHIGAN SUPREME COURT

* * *

Indeed, there is considerable question as to whether the Supreme Court has instructed courts to independently review the factual record to determine whether defamation exists or, more specifically, whether a statement is materially false. Although the majority made favorable reference to Monaghan, *Constitutional Fact Review,* 85 Colum L Rev 229 (1985), it ignored the following language of that article:

> Even with respect to defamation actions, *Bose* needs further elaboration. For example, the Court makes no mention of its decision in Time, Inc. v. Firestone, 424 U.S. 448 (1976), in which it applied a clearly erroneous standard in reviewing a state court jury determination that a publication was not "factually correct." Id. at 457-59. . . . *Moreover, doubt exists whether the independent judgment requirement extends to the question whether the statements are in fact defamatory.*

Id. at 244 n.83 (emphasis added). The question of material falsity is, of course, a prerequisite to a prima facie showing of defamation. See *Locrhcchio, supra,* 438 Mich 84, 116; 476 NW2d 112, 133. It thus appears that the independent review standard may not even apply to the issue of material falsity.

Although the Plaintiff does not allege that it was erroneous for this Court to independently review the record in the present case, the proper scope of such independent review is clearly uncertain. Because of this

uncertainty, and because of the above cited case law, upon reconsideration of this matter, the Court should review the record to determine whether there was sufficient evidence for *the jury* to find material falsity.

* * *

Supreme Court, U.S.
FILED
JAN 7 1993
OFFICE OF THE CLERK

No. 92-895

In The

Supreme Court of the United States

October Term, 1992

DAVID J. ROUCH,

Petitioner,

v.

ENQUIRER AND NEWS OF BATTLE CREEK, MICHIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

PETITIONER'S REPLY BRIEF AND APPENDIX

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QUESTION PRESENTED

I.

WHETHER THE FIRST AMENDMENT QUESTIONS PRESENTED BY THIS PETITION — THE CONSTITUTIONAL STANDARD FOR APPELLATE REVIEW OF EVIDENCE OF FALSITY AND THE CONSTITUTIONAL STANDARD FOR SUFFICIENCY OF EVIDENCE OF FALSITY IN A DEFAMATION ACTION BROUGHT BY A PRIVATE CITIZEN — WERE PRESENTED TO THE MICHIGAN SUPREME COURT AND DECIDED BY THAT COURT.

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PETITIONER'S REPLY BRIEF

CORRECTIONS TO RESPONDENT'S STATEMENT OF THE CASE

Respondent, in its Brief, makes some new factual assertions which are unsupported by the record. Some of the assertions are characterizations of the record rather than accurate summaries of the record, itself. The Petitioner stands by his initial statement of the case as fully supported by the record, and notes the following corrections to Respondent's assertions.

Respondent asserts at pp. 3-4, and in fn.2 on p. 3 of its Brief that the record shows that the reporter who wrote the defamatory story had talked to "the police" to get the information contained in the story, and that because the trial occurred eight years after he wrote the story he forgot who he talked to. This assertion is a distortion of the record below. The reporter claimed both at his deposition and again at trial, that he was

not uncertain of whom he talked to, rather that he was certain that he talked to one of two police officers, either Chief Bell or Officer Minier. The reporter insisted that he had talked to one of those two officers and that he "relied on the honesty" of Bell or Minier. A-205. The record does not present a question of memory failure of the reporter, Kaufman, but rather of credibility, since both Chief Bell and Officer Minier testified that they never spoke to the reporter, nor would they permit information to be released about Mr. Rouch's arrest because it would have been against departmental policy. A-206-211. The Respondent was unable to produce at trial any police officer who ever confirmed that the reporter based his story about the Petitioner on any official information conveyed by the police.

The Respondent notes in its Brief that the Michigan Supreme Court in its majority opinion found that it was unnecessary to address the question of who, if anyone, supplied the reporter with the information contained in the story. See, fn.14 in decision sought to be reviewed (A-9-10). However, the failure of the Michigan Supreme court to address this credibility question is illustrative of the problem of *de novo* independent judicial review of evidence of falsity where no deference is given to the jury's findings. The jury may have resolved this credibility question against the Respondent, and concluded that the assertions in the Respondent's story that the "police said" that Rouch did certain unspeakable acts in commission of a sex crime and that it "is said" that Rouch performed other criminal acts were not the products of official police statements. A-198. Although everyone assumed the reporter got his information about Rouch's arrest from the police, including the Plaintiff himself, on the record of this case it was never proved that anyone "said" Rouch committed the crime.

The Respondent claims without citation to the record that the judgment in this case "approximated $4,000,000" when the Michigan Supreme Court dismissed the action in the decision now challenged. Resp. Brief, p. 5. This claim is a venture outside the record of this cause; the judgment entered at the time of the jury verdict did not compute interest or costs and its current amount is unknown. A-150.

The Respondent suggests that the Petitioner and many witnesses conceded that the Petitioner was "charged" with a sex crime. Resp. Brief, pp. 5-6. Although witnesses may have used the word "charged" in referring to the arrest of the Petitioner or to statements made by the police, the Petitioner was *never formally charged* by the prosecutor's office with a sex offense. It is the lack of a formal charge by the prosecuting attorney's office that the Respondent's counsel conceded in his closing argument to the jury and Respondent conceded in its published retraction. Respondent prints in its appendix (4a-6a) the argument of its counsel suggesting that the police arrest and Prosecutor's authorization of that arrest presents a basis for an allegation that the Petitioner was "charged," but the Respondent did not print that portion of argument where its counsel conceded there was no formal charge:

> There was no warrant. There were initial kinds of charges that might have been brought in court, but they were not, even though the plaintiff in this case had been charged by the police. (Tr. 1031)

And the Respondent's claims ignore its own retraction wherein the Respondent admitted that the Petitioner "was never formally charged in this case . . ." and that the prosecuting attorney who had approved the arrest

"declined to issue formally a warrant several days later." (A-199) The Respondent found it necessary to correct the false statement in the original defamatory article that "the charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office," a statement which is admittedly false, and which the jury must have found to be false.

The Respondent would like this Court to believe that the identification of Rouch as the rapist by the babysitter and the two minor children was some sort of a reliable identification, by suggesting that there was a "pre-existing relationship" with Rouch, "enhancing her ability to recognize him." p. 7, Resp. Brief. What the Respondent does not tell the Court is that the "pre-existing relationship" consisted of Rouch picking up the babysitter that evening and dropping her off for her babysitting job at Rouch's ex-wife's home. R.506a. What the Respondent does not tell the Court is that the babysitter initially identified Rouch as the rapist because, even though the rapist wore a ski mask, she thought the voice was similar to that of Rouch's. R.506a. Respondent's characterization of the identification of Rouch as reliable is misleading to the Court. Another man was eventually charged by the prosecution with the rape of the babysitter because the initial identification by an hysterical rape victim was clearly mistaken.

REPLY ARGUMENT

THE QUESTIONS PRESENTED BY THIS PETITION — THE SCOPE OF CONSTITUTIONALLY MANDATED INDEPENDENT APPELLATE REVIEW OF EVIDENCE OF FALSITY AND THE CONSTITUTIONAL STANDARD FOR SUFFICIENCY OF EVIDENCE OF FALSITY IN A DEFAMATION ACTION BROUGHT BY A PRIVATE CITIZEN — WERE RAISED BY BOTH RESPONDENT AND PETITIONER IN THE COURT BELOW AND

FORMED THE BASIS OF THE MICHIGAN SUPREME COURT'S DECISION.

The Respondent in its Brief claims that the Petitioner "waived" one of the questions now presented to this Court, but the Respondent then proceeds to quote from the Petitioner's Brief in the Michigan Supreme Court wherein the Petitioner raised the very question it now raises before this Court. Respondent's Brief, pp. 8-9. Some clarification of how the issues were presented and raised in this case is now required because of the Respondent's Brief.

The questions raised by the Petitioner in this case involve the proper deference to be afforded to a jury's findings when an appellate court conducts the constitutionally required review of evidence of falsity in a defamation case and the constitutional standard for the sufficiency of evidence of "material" falsity in defamation actions brought by private citizens. These issues are federal questions because this Court has held that the First Amendment requires a reviewing court to review jury verdicts in defamation cases to determine whether the verdict was an intrusion into protected speech and because this Court has held that a private citizen has the constitutional burden of proving falsity in a defamation action. Since both of these questions involve appellate review of a jury verdict, the relevant inquiry under Supreme Court Rule 14.1(h) is whether these federal constitutional questions were raised in the courts below in the appeal *after the verdict.*

Since the verdict was favorable to the Petitioner, it was the Respondent who was the appellant in both the appeal to the Michigan Court of Appeals from the trial court's verdict and the subsequent appeal from the Michigan Court of Appeals to the Supreme Court. Therefore, it was the Respondent who presented the issues to

the Court and as the Petitioner has already demonstrated in its Petition for Certiorari and Appendix thereto, the Respondent clearly raised to both the Michigan Court of Appeals and the Michigan Supreme Court the questions of independent judicial review of evidence of falsity in a private citizen defamation action and the sufficiency of evidence of falsity. A-215-218.

The Respondent concedes in its Brief, pp. 7-8, that the question of the scope of independent judicial review of the question of falsity was raised by the Respondent on appeal of this matter in the Michigan state courts. The Respondent also claims that the Petitioner acceded to the scope of review suggested by the Respondent, but an examination of the record discloses that the Petitioner never conceded that the standard of review should permit the court to substitute its judgment for that of the jury, nor did the Petitioner concede that the evidence was insufficient to support the verdict.

The Respondent's argument to this Court regarding Petitioner's "waiver" of the issue of the standard or scope of independent appellate review in defamation cases seems to misapprehend the questions presented to this Court. The question presented to the Court by the Petition for Certiorari is not whether the Court may conduct an independent judicial review of the record for sufficient evidence of falsity, but what deference should be given to a jury's findings when an appellate court conducts its independent judicial review (and when is evidence insufficient of falsity as a matter to support a defamation verdict).

The question of whether judicial review of a defamation verdict requires deference to a jury's findings was not waived by Petitioner in his Brief to the Michigan Supreme Court, but joined, when the Petitioner stated:

> The purpose of independent review is not to usurp the proper function of the jury but to ensure that the plaintiff has presented evidence sufficient to meet its constitutionally mandated burden of proof. Resp. Brief, p. 9; Resp. App., p. 7a)

When the Michigan Supreme Court reviewed the entire record *de novo* with no deference to the jury's special verdict finding "material falsity," the court was not accepting an invitation of Petitioner.

The Respondent does not claim that the question of the sufficiency of evidence was waived by Petitioner. The issue of the sufficiency of the evidence of material falsity was clearly presented by the Petitioner to the Michigan Supreme Court in Petitioner's Brief. See excerpt of Petitioner's Brief in the Appendix to this Reply Brief. A-219.

The suggestion by the Respondent that a footnote in the negligence argument of the Appellee's Brief in the Michigan Supreme Court somehow stands for the proposition that the Petitioner advocated a broad scope of independent judicial review by appellate courts misreads the argument of Petitioner. Resp. Brief, p. 9. The footnote, read in the context of the entire argument, does not advocate a broad scope of judicial review but merely suggests that the Michigan Supreme Court's review should be limited to reviewing the conclusion of the Michigan Court of Appeals, and not necessarily its reasoning.

The Respondent suggests in its Brief that there were independent state grounds on which the decision of the Michigan Supreme Court was based, citing the Court's discussion of several state cases in the fourth section of its opinion. However, the Michigan Supreme Court

clearly stated that its opinion was based on law mandated by the First Amendment of the Constitution of the United States and by the decisions of the United States Supreme Court applying the First Amendment to defamation actions.

In Part III of its opinion (A-12–17) the Michigan Supreme Court announced that it was reviewing the record with regard to falsity because a libel case affects "constitutionally protected public discourse" and such review is necessary "in order to preserve the precious liberties established and ordained by the Constitution," citing *Bose* v. *Consumers Union*, 466 U.S. 485 (1984). A-12. The court goes on to discuss federal constitutional law as enunciated by the Supreme Court in numerous cases, and concludes that there is a "need for independent review grounded on the fear that juries may give short shrift to important First Amendment rights." A-17.

In Part IV of its opinion, where the court considers the sufficiency of evidence of falsity, the Michigan Supreme Court relied on *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. ___, 111 S. Ct. 2419 (1991), and concluded that "the constitutional requirement for testing falsity mirrors Michigan's common law test." A-19.

In concluding that the evidence was insufficient to establish material falsity in Part V of its opinion, when it announced its holding, the Michigan Supreme Court noted that it had reviewed the record in light of "the latest constitutional pronouncements on the subject . . ." A-31.

The Respondent's suggestion that the Michigan Supreme Court applied the proper standard of review and that the standard of review is not in substantial conflict with the decisions of other appellate courts is an argument without merit and without authority. The

Michigan Supreme Court, itself, in the case sought to be reviewed, recognized that it had gone farther in creating independent *de novo* review of falsity than the United States Supreme Court itself had gone. In fn. 20 (A-15), the Michigan Supreme Court gave deference to this Court's decision in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989), where the requirement for an independent review of a jury verdict was more narrow than in *Bose* v. *Consumers Union*, *supra*. This conflict in the United States Supreme Court's delineation of what constitutes the proper scope of independent judicial review of falsity was not only recognized by the majority, but also formed the basis of the dissenting opinion of Justice Cavanagh in the Michigan Supreme Court. A-39–42. Justice Cavanagh noted that the United States Supreme Court in *Bose* had proscribed a narrower scope of judicial review than the Michigan Court had adopted (and a narrower scope than other appellate courts have adopted).

The Respondent's attempt to distinguish other appellate cases which have rejected independent, *de novo*, review of a jury's findings of falsity is disingenuous; the Respondent never acknowledges the fact that in each of the cases cited by the Petitioner at pp. 17-18 of the Petition the Courts have expressly declined to extend the doctrine of independent, *de novo*, review as far as the Michigan Supreme Court has in the instant case.

Respondent's Brief does not cite a case to this Court which refutes the assertion that the Michigan Supreme Court is alone in the wilderness in its declaration if its *de novo* review of a jury verdict wherein no deference is given to a jury's findings.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari, and in this Reply Brief, the Petitioner requests that the Petition for Certiorari to the Supreme Court of Michigan be granted.

Respectfully submitted,

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Dated: January 7, 1993

APPENDIX TO PETITIONER'S REPLY BRIEF

• • •

EXCERPT FROM PETITIONER'S BRIEF IN THE MICHIGAN SUPREME COURT, No. 89799, FILED OCTOBER 7, 1991

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